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DATO' SRI MOHD NAJIB TUN HJ ABD RAZAK v. MENTERI DALAM NEGERI & ORS

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
AZHAHARI KAMAL RAMLI JCA
B MOHD FIRUZ JAFFRIL JCA
[CIVIL APPEAL NO: W-01(IM)-456-07-2024]
16 JUNE 2025

C **Abstract** – *Leave for judicial review ought to be granted for a substantive hearing where new and credible evidence, satisfying the conditions for admissibility at appeal, demonstrates a good arguable case regarding the existence and non-enforcement of a royal pardon addendum affecting personal liberty, especially if the respondents' conduct prevents earlier admission of such evidence.*

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ADMINISTRATIVE LAW: *Judicial review – Mandamus – Royal pardon – Addendum order – Applicant found guilty of all charges and accordingly convicted by High Court – Conviction and sentence affirmed by Court of Appeal and Federal Court – Applicant filed petition to Yang di-Pertuan Agong ('YDPA') for complete and/or full pardon against conviction and sentence – YDPA issued addendum order – Applicant allowed to serve reduced sentence of imprisonment under condition of 'home arrest' instead of confinement in prison – Lack of enforcement of addendum order – Applicant's request for original/copy of addendum order unanswered by respondents – Judicial review against respondents for refusal to answer and/or confirm existence of addendum order – Order for execution of addendum order – Whether ought to be allowed – Federal Constitution, art. 42*

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EVIDENCE: *Fresh or further evidence – Admissibility – Royal pardon – Judicial review – Applicant sought to adduce new evidence at appeal stage – Whether there was reasonable diligence – Whether evidence could be obtained with reasonable diligence for use at original trial or earlier proceedings – Whether evidence, if admitted, would have important influence on result of case – Whether possessed significant probative value capable of swaying outcome – Whether evidence presumably to be believed or apparently credible – Whether all conditions for admissibility of fresh evidence fulfilled*

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The appellant was charged in the High Court in relation to what is now commonly known as the SRC case where he was found guilty of all charges and accordingly convicted. The appellant's appeals to the Court of Appeal and the Federal Court were dismissed. The appellant filed a petition to the Yang di-Pertuan Agong ('YDPA'/'His Majesty') for a complete and/or full pardon against the conviction and sentence of the SRC case, pursuant to, *inter alia*, art. 42 of the Federal Constitution. Following the petition filed, the

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appellant filed subsequent addendums to the YDPA for His Majesty's consideration wherein other relevant developments in relation to the issues of pardons were raised, mostly in relation to the dominant issue that the appellant was never given a fair trial or properly heard in the appeals. The fourth respondent, under the purview of the fifth and sixth respondents, announced that the YDPA had convened the 61st Pardons Board Meeting where His Majesty ordered that the appellant's imprisonment sentence be reduced from 12 years to six years and the fine of RM210 million be reduced to RM50 million ('main order'). It was the appellant's case that: (i) the YDPA had also immediately issued an addendum order on the same day. This addendum order, however, was not announced by the fourth to sixth respondents or, by any of the other respondents when the announcement of the main order was made; (ii) he had received clear and reliable information that, in addition to the main order, His Majesty had issued an addendum order that the appellant be allowed to serve the reduced sentence of his imprisonment under condition of 'home arrest', instead of confinement in Kajang Prison or any other prison. Armed with that information, the appellant instructed his solicitors to confirm the details of the addendum order with the Attorney General. Subsequently, the matter was escalated to the other respondents regarding the existence and lack of enforcement of the addendum order. When the appellant requested from the Director of Kajang Prison, for the original copy of the addendum order or a copy of the main order, the request went unanswered. The appellant then filed an application for leave to commence judicial review in the High Court, against the respondents, premised on the respondents' refusal to: (i) answer and/or confirm the existence of an addendum order; (ii) execute the addendum order; and (iii) provide the original version/copy of the main order and the addendum order. The respondent objected to the appellant's judicial review application and argued that: (i) the appellant's affidavits contained pure hearsay and did not meet the minimum threshold of reliability in affirming the existence of the addendum order; and (ii) under such circumstance, the leave application was vexatious and frivolous as there was no genuine case for review. The High Court dismissed the appellant's application. Hence, the present appeal. In this appeal, the appellant filed two motions: (i) an application to adduce new evidence ('encl. 26'). This application was accompanied by the affidavit in support by the appellant's lead counsel ('encl. 27') and by the appellant's son ('Nizar') ('encl. 29'), which exhibited an unsigned copy of the much sought after addendum order; and (ii) an application to amend the notis usul dated 3 December 2024 ('encl. 50'). Under the proposed amended notis usul terpinda, the appellant sought to introduce a second affidavit by Nizar which exhibited a letter from the Controller of the Royal House of Pahang, stating that the unsigned copy of the addendum order in encl. 29 was given to Nizar by the Sultan of Pahang, *ie*, the previous YDPA.

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Held (allowing appeal; ordering matter to be remitted to High Court for hearing of substantive judicial review application)
Per Mohd Firuz Jaffril JCA (for the majority):

(1) The Federal Court, in *Lau Foo Sun v. Government Of Malaysia* prescribed the following three conditions that must be fulfilled by the appellant in order for fresh evidence to be admissible at the appeal: (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive; and (iii) the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible although it need not be incontrovertible. (para 22)

(2a) The appellant, *via* his solicitors, had exercised reasonable diligence in their attempt to obtain a copy of the addendum order. This was supported by the fact that they had written to all respondents seeking the same. The appellant, in fact, attempted to introduce the said document for purposes of the leave application for judicial review *vide* the affidavits of Dato' Seri Ahmad Zahid and Dato' Seri Hj Wan Rosdy ('Wan Rosdy') who said that they had seen a copy of the addendum order in Tengku Zafrul's mobile phone. This attempt proved futile. (paras 34 & 35)

(2b) On 17 August 2024, the YDPA requested for Nizar to seek audience. It was only upon the latter's audience with His Majesty that the appellant managed to get a copy of the addendum order. Even that came with a caveat that the same could not be used in court without the consent of His Majesty. Without the consent of His Majesty, it was not possible for the appellant to file the addendum into court nor could the appellant compel His Majesty to furnish the said addendum. Finally, on 2 December 2024, the YDPA gave consent for the appellant to use the copy of the addendum order in court. This prompted the filing of encl. 26. (paras 36 & 37)

(3) Had a copy of the addendum order given by the YDPA to Nizar been exhibited in support of the appellant's leave application for judicial review, it would have warranted a careful consideration by the High Court. In other words, the leave application would have had merit and necessitated serious consideration and, not grounded on pure hearsay or was frivolous, although not necessarily resulting in the case being decided in favour of the appellant. (para 40)

(4) The copy of the addendum order, as exhibited in encl. 27, was credible. There was no rebuttal evidence from the respondents challenging the existence nor the authenticity of the copy of the addendum order. Based on the third respondent's refusal to reply to the appellant, seeking confirmation of the existence of the addendum order and the indirect admission that the addendum order was indeed issued by the then YDPA to the third respondent, the respondents were estopped and ought not to be permitted to insist that the appellant had failed to comply with the rule set out in *Ladd v. Marshall*. (paras 41, 42 & 45)

(5) The appellant's case was one which the appellant clearly had *locus* to file, not frivolous or vexatious and indeed worth of consideration given the fact that the addendum order affected the appellant's personal liberty, pursuant to the powers conferred by the Federal Constitution on the YDPA. In other words, the appellant's rights were infringed due to the fact that the addendum order mandated for him to serve the remainder of his imprisonment sentence at home. There was also no other alternative procedure to ventilate the appellant's pursuit of freedom from incarceration at the Kajang Prison. (para 63)

(6) The appellant's application for leave was not one that questioned the power of pardon of the YDPA. Instead, it sought clarification on issues that were clearly neither frivolous nor vexatious. In fact, it called for further investigation by way of a substantive hearing where all related evidence and arguments required could be presented and heard. Hence, leave for judicial review ought to be granted. (paras 66 & 67)

(7) An applicant in a leave application for judicial review only needs to show that he/she has a good arguable case, premised on the fact that his/her interest/rights had been aggrieved. Based on the facts, the failure of the third respondent to carry out the terms of the addendum order had aggrieved the interest and rights of the appellant. (para 74)

Per Azizah Nawawi JCA (dissenting):

(1) Despite the fact that appellant hailed from the State of Pahang, where he was once the Menteri Besar, and the fact that his son was currently an Executive Member of the State Government, the appellant failed to explain how and why they failed to obtain the addendum order with reasonable diligence. The appellant failed to take sufficient steps in pursuing the addendum order from the Pahang Palace. This evidence could have been made available during the hearing if due diligence was taken. There was no merit in the appellant's application to adduce the fresh evidence and the same was dismissed. (paras 139 & 140)

(2) The affidavit affirmed by Wan Rosdy confirmed that his knowledge of the addendum order was based entirely on information from Tengku Zafrul. Wan Rosdy had no personal knowledge of the order, apart from what was told and shown to him on Tengku Zafrul's mobile phone. None of the affidavits concerning the existence of the addendum order were made by deponents with direct knowledge. The evidence relied upon was purely hearsay. Accordingly, the requirement of O. 53 r. 3(2) of the Rules of Court 2012 for a proper verifying affidavit was not satisfied. (paras 154 & 157)

(3) There was no provision, in any written law or the Federal Constitution, that imposed a legal duty on the Pardons Board to confirm or produce any order related to the exercise of the power to pardon. As there was no legal provision requiring the respondents to carry out the duty in question, the appellant had no legal right to seek an order of *mandamus* regarding the addendum order. The application was frivolous and vexatious and was correctly dismissed by the High Court. (para 162)

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Anan Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Stock Co) [2019] SGCA 41 ***(refd)***

Chai Yen v. Bank of America National Trust & Savings Association [1980] CLJU 6; [1980] 1 LNS 6 FC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal [2020] 2 CLJ 73 CA ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(dist)***

Datuk Seri Anwar Ibrahim v. Mohd Khairul Azam Abdul Aziz & Another Appeal [2023] 2 CLJ 236 CA ***(refd)***

Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors [2009] 6 CLJ 102 CA ***(refd)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] CLJU 76; [1989] 1 LNS 76 HC ***(refd)***

Gobi Avedian v. AG [2020] SGCA 77 ***(refd)***

Hj Salleh Jafaruddin v. Datuk Celestine Ujang & Ors [1986] 2 CLJ 209; [1986] CLJ (Rep) 142 SC ***(refd)***

Hue Ngee On v. Chai Woo Sien (Sebagai Pegawai Awam Persatuan Hakka Kulai, Johor) [2009] 5 CLJ 734 CA ***(refd)***

IRC v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***

Juraimi Husin v. Pardons Board Of State Of Pahang & Ors [2002] 4 CLJ 529 FC ***(refd)***

Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ 495 ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***
Komoco Motors Pte Ltd v. Faridah Abdullah [2013] 7 CLJ 451 CA ***(refd)***
Koon Hoi Chow v. Pretam Singh [1972] CLJU 56; [1972] 1 LNS 56 HC ***(refd)***
Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals [2023] CLJU 2226; [2023] 1 LNS 2226 CA ***(dist)***
Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] CLJU 56; [1970] 1 LNS 56 FC ***(refd)***
Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals [2004] 4 CLJ 282 CA ***(refd)***
Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***
Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd [2005] 3 CLJ 238 CA ***(refd)***
Messrs Tai Choi Yu & Co, Advocates v. Arifin Zakaria & Anor [2020] 2 CLJ 508 CA ***(refd)***
Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 10 CLJ 36 CA ***(refd)***
Ng Hee Thoong & Anor. v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Peguam Negara Malaysia v. Chin Chee Kow [2018] CLJU 1273; [2018] 1 LNS 1273 CA ***(refd)***
Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj [2011] 9 CLJ 645 CA ***(refd)***
Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA ***(refd)***
PP v. Soon Seong Sia Heng & Other Cases [1979] CLJU 81; [1979] 1 LNS 81 FC ***(refd)***
R (Bancoult) v. Secretary of State [2016] UKSC 35 ***(refd)***
R (Police Superintendents' Association) v. Police Remuneration Review Body [2024] 1 WLR 1663 ***(refd)***
R (Quark Fishing Ltd) [2002] EWCA Civ 1409 ***(refd)***
R v. Lancashire County Council, ex p Huddleston [1986] 2 All ER 941 ***(refd)***
Ravindran P Muthukrishnan v. Malaysian Examinations Council [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320 FC ***(refd)***
See Choo v. Suruhanjaya Sekuriti [2005] 2 CLJ 20 CA ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***
Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 CLJ 87 CA ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 CLJ 193 FC ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Young v. Bristol Aeroplane [1944] KB 718 ***(refd)***

A **Legislation referred to:**
Courts of Judicature Act 1964, ss. 25(2), 69(2), (3)
Federal Constitution, arts. 5(1), 42(1), (2)
Rules of Court 2012, O. 41 r. 5(2), O. 53 rr. 3(2), (3), 4(2), 6, O. 55 r. 7
Rules of the Court of Appeal 1994, r. 7(2), (3A)
Specific Relief Act 1950, s. 44(1)

B *For the appellant - Muhammad Shafee Abdullah, Muhammad Farhan Shafee, Wan Mohammad Arfan Wan Othman & Syafiqah Sofian Farhan; M/s Shafee & Co*
For the respondents - Shamsul Bolhassan & Ahmad Hanir Hambaly; SFCs & Ainna Sherina & Safiyyah Omar; FCs
Watching brief for MPs - Hamzah, Ronald Kiandee, Takiyuddin Hassan

C *[Editor's note: For the High Court judgment, please see Dato' Sri Mohd Najib Tun Hj Abd Razak v. Menteri Dalam Negeri & Ors [2024] 10 CLJ 88 (overruled).]*

Reported by Lina E

D **JUDGMENT**

Mohd Firuz Jaffril JCA (majority):

Introduction

[1] This present appeal before us is against the Kuala Lumpur High E Court's decision dated 3 July 2024 which dismissed the appellant's (the applicant) application for leave to commence Judicial Review proceedings.

[2] The said appeal was heard on 6 January 2025. At the end of the appeal, both my learned brother, Justice Azhahari Kamal Ramli and myself, F decided in favour of the appellant, whilst my learned sister, Justice Azizah Nawawi dissented. We now give our reasons for deciding so.

Brief Facts

[3] The applicant is the former Prime Minister of Malaysia.

G **[4]** The respondents are:

(i) Minister of Home Affairs, the Minister in the Prime Minister's Department (Law and Institutional Reform);

(ii) the Commissioner General of Prison;

H (iii) the Attorney General of Malaysia;

(iv) the Pardons Board for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya;

(v) Minister in the Prime Minister's Department (Law and Institutional I Reform)

(vi) the Director General of the Legal Affairs Division; and

(vii) the Government of Malaysia.

[5] On 4 July 2018 and 8 August 2018, the applicant was charged in the Kuala Lumpur High Court in relation to what is now commonly known as the "SRC case" where he was found guilty of all charges on 28 July 2020. Accordingly, he was duly convicted by the High Court. Thereafter, the applicant appealed to the Court of Appeal and the Federal Court. Both appeals were dismissed.

[6] On 1 September 2022, the applicant through his solicitors Messrs Shafee & Co filed a petition to the Yang di-Pertuan Agong ("YDPA") for a complete and/or full pardon against the conviction and sentence of the SRC case pursuant to, *inter alia*, art. 42 of the Federal Constitution.

[7] Following the petition filed on 1 September 2022, the applicant filed subsequent addendums to the YDPA on 18 October 2022 and 20 April 2023 for His Majesty's consideration wherein other relevant developments in relation to the issues of pardons were raised, mostly in relation to the dominant issue that the applicant was never given a fair trial or properly heard in the appeals.

[8] On 2 February 2024, the fourth respondent under the purview of the fifth and sixth respondents announced that the YDPA (interchangeably referred to as "His Majesty") had convened the 61st Pardons Board meeting for the Federal Territories on 8 December 2023. The said meeting was then adjourned to 15 January 2024 and then to 29 January 2024 when the Pardons Board finally sat again, wherein His Majesty ordered that the applicant's imprisonment sentence be reduced from 12 to 6 years and the fine of RM210 million reduced to RM50 million, *ie*, the "main order".

[9] It is the applicant's case that His Majesty had also immediately or simultaneously issued an addendum order on the same day. This addendum order was however not announced by the fourth to the sixth respondents or by any of the other respondents when the announcement of the main order was made on 2 February 2024.

[10] According to the applicant, he had on 12 February 2024 received clear and reliable information that in addition to the main order dated 29 January 2024, His Majesty had issued an addendum order stipulating that the applicant be allowed to serve the reduced sentence of his imprisonment under condition of "home arrest," instead of confinement in Kajang Prison or any other prison.

[11] Armed with that information, the applicant instructed his solicitors to confirm the details of the addendum order with the Attorney General. The letter was also copied to the Prime Minister and Deputy Prime Minister of Malaysia. Subsequently, the matter was escalated to the other respondents regarding the existence and lack of enforcement of the addendum order.

[12] On 19 February 2024, the applicant's solicitors wrote to the director of Kajang Prison requesting for the original copy of the addendum order or a copy of the main order. The request went unanswered.

[13] In so far as the applicant is concerned, his personal rights have been adversely affected and infringed upon since 29 January 2024 by the decision of all the respondents in ignoring and refraining from responding to the inquiries made by the applicant's solicitors to enforce the addendum order granted by His Majesty.

[14] This led to the applicant filing an application for leave to commence judicial review against the respondents. The application for judicial review before the High Court is premised on the following:

(i) the respondents' refusal to answer and/or confirm the existence of an addendum order dated 29 January 2024;

(ii) the respondents' refusal to execute the addendum order dated 29 January 2024;

(iii) the respondents' refusal to provide the original version or a copy of the main order dated 29 January 2024; and

(iv) the respondents' refusal to provide the original version or a copy of the addendum order dated 29 January 2024.

Crux Of The Applicant's Case

[15] It is the applicant's plaint that:

(i) the respondents' decision not to produce and/or provide the addendum order is unreasonable and/or irrational and certainly a total breach of duty; and

(ii) the respondents should admit the existence of the addendum order and provide the applicant with an original or copy thereof.

Respondents' Objection To The Applicant's Application For Leave

[16] The respondents took issue with the applicant's affidavits contending that they contained pure hearsay and did not meet the minimum threshold of reliability in affirming the existence of the addendum order. Under such a circumstance, the leave application is vexatious and frivolous as there is no genuine case for review.

The High Court's Decision

[17] As stated at the beginning of this judgment, the High Court had on 3 July 2024 dismissed the applicant's leave application. The following is a summary of the High Court's findings:

(i) The appellant's affidavit verifying the facts pursuant to O. 53 r. 3(2) of the ROC 2012, the affidavit in support by YAB Dato' Sri Ahmad Zahid bin Hamidi and that of YAB Dato' Sri Wan Rosdy bin Wan Ismail were based on pure hearsay and are inadmissible (see paras. 16 18, 20, 21 and 23 of the HC's grounds of judgment); and

(ii) The appellant had failed to satisfy the criteria for the granting of an order for *mandamus*. In summary, the appellant had failed to show that there is a legal duty on the Pardons Board to confirm the existence or produce any order wherein the power to pardon was exercised and that the appellant had failed to show any failure on the part of the respondents, in particular the Pardons Board, to perform any statutory duties compelled to them in law.

Proceedings At The Court Of Appeal

[18] At the hearing of the appeal, the applicant filed two motions before us:

(i) Enclosure 26: the applicant's application to adduce new evidence by way of a notice of motion dated 3 December 2024. This application was accompanied by the affidavit in support by Muhammad Shafee bin Abdullah, lead counsel for the applicant (encl. 27) and by the applicant's son, Mohamad Nizar bin Mohd Najib (encl. 29) which exhibited an unsigned copy of the much sought after addendum order; and

(ii) Enclosure 50: the applicant's application to amend the notis usul dated 3 December 2024. Under the proposed amended notis usul terpinda, the applicant also sought to introduce a second affidavit by Mohamad Nizar bin Mohd Najib which exhibited a letter from the controller of the Royal House of Pahang stating that the unsigned copy of the addendum order exhibited in encl. 29 was given to Mohamad Nizar by His Majesty the Sultan of Pahang *ie*, the previous YDPA.

[19] As encl. 50 was an application to amend the notis usul dated 3 December 2024, the panel decided to hear both applications simultaneously.

The Application To Introduce New Evidence

[20] The principles applicable in an application to adduce new evidence at the appeal stage can be found in O. 55 r. 7 ROC 2012 as reproduced below:

> Order 55 Rule 7 of the ROC 2012
>
> Restriction on Evidence
>
> At the hearing of any appeal, fresh evidence shall not be admitted unless the Judge is satisfied that:
>
> (a) at the hearing in the Subordinate Court, the evidence was not available to the party seeking to use it or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have a determining influence upon the decision of the Subordinate Court.

[21] The above rule incorporates the principles applicable in adducing fresh evidence at the appeal stage as propounded in the case of *Ladd v. Marshall* [1954] 3 All ER 745.

[22] The Federal Court in *Lau Foo Sun v. Government Of Malaysia* [1970] CLJU 56; [1970] 1 LNS 56; [1970] 2 MLJ 70 prescribed the following three conditions that must be fulfilled by the appellant in order for fresh evidence to be admissible at the appeal:

(i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(iii) the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, although it need not be incontrovertible.

[23] In *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals* [2004] 4 CLJ 282; [2004] 4 MLJ 105, Abdul Kadir Sulaiman JCA held that all three conditions as stated above must be fulfilled in order for fresh evidence to be admissible at the hearing of an appeal.

[24] Given the personalities involved in this appeal, we pause to state that the principles above apply to everyone regardless of stature, race or political allegiance.

Appellant's Submission

[25] The appellant's submission can be summarised as follows:

(i) under s. 69(2) CJA and r. 7(2) RCA, further evidence may be adduced without leave in interlocutory applications or where such matters occurred after the date of the impugned decision (see *Gobi Avedian v. AG* [2020] SGCA 77 and *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 1 MLRA 344).

(ii) the dismissal of the application for leave to commence judicial review is interlocutory and not a judgment after a full hearing on merits. Therefore, the addendum order which was received after the High Court's decision falls squarely within this category.

(iii) alternatively, in the event that the court decides that leave is necessary, the appellant submits that the application satisfies the cumulative conditions under r. 7(3A) RCA and s. 69(3) CJA, which are consistent with the principles laid out in *Ladd v. Marshall* (*supra*).

(iv) article 5(1) of the Federal Constitution requires that procedural and substantive justice to be upheld. Hence, the decision of the learned HCJ in dismissing the addendum order and testimony would deprive the appellant of the opportunity to fully present his case and which potentially could lead to an unjust outcome.

(v) the Attorney General has breached his duty of candour in a judicial review proceedings. Being public authorities, the respondents are bound by the duty of candour in judicial review proceedings, requiring full, fair, and accurate disclosure of all relevant material. The Attorney General's omission to disclose or respond to the addendum order despite repeated demands and the court's extension of time constitutes a flagrant breach of this duty (reliance placed on the cases of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167; [2023] 3 MLJ 829; *R (Bancoult) v. Secretary of State* [2016] UKSC 35; *R (Quark Fishing Ltd) [2002] EWCA Civ 1409; R v. Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 and *R (Police Superintendents' Association) v. Police Remuneration Review Body* [2024] 1 WLR 1663).

Respondent's Submission

[26] In response to encl. 26, the respondents filed an affidavit (encl. 47) affirming that the respondents referred to the press statement made by the Istana Negara dated 3 January 2025. The press statement in gist detailed the prerogative powers of the YDPA among others as art. 42(1) and (2) of the Federal Constitution and the process in applying for a pardon or to reduce the sentence brought before the Pardon Board.

[27] By way of a letter dated 3 January 2025 (encl. 48), the respondents took the position that they would rely on the case of *Komoco Motors Pte Ltd v. Faridah Abdullah* [2013] 7 CLJ 451.

Court's Analysis Of The Application To Introduce New Evidence

[28] It is the appellant's case that they could not procure the said addendum for purposes of the JR application. Prior to the same being filed, the applicant had written to the six respondents seeking to confirm the existence of the addendum order. These letters were never responded to by any of the respondents.

[29] Notwithstanding the cold treatment by the respondents, the applicant continued in its attempt to obtain evidence on the existence of the addendum order from various sources which includes the affidavits of the Deputy Prime Minister, YAB Dato' Seri Zahid bin Hamidi and YAB Menteri Besar of Pahang Dato Sri Wan Rosdy bin Wan Ismail, which substantially affirmed that the information on the existence of the addendum order was obtained from the then Minister of Trade, YBM Tengku Zafrul bin Tengku Aziz.

[30] In dismissing the leave application for JR, the learned High Court Judge made a finding that the information obtained from these various sources was hearsay and inadmissible.

[31] Post-judgment by the High Court, the appellant appealed and also filed a notice of motion for leave to introduce new evidence (encl. 26). In support of encl. 26, the applicant's son, Mohamad Nizar bin Mohd Najib affirmed an affidavit dated 2 December 2024 (encl. 29) stating *inter alia*:

(i) that he had obtained a copy of the addendum order from the office of His Majesty the Sultan of Pahang on 17 Aug 2024 with strict instructions that the same should not be used without the consent of the Sultan. (See para. 7)

(ii) that he had then sought permission from the Sultan to use the copy of the addendum order in his affidavit for purposes of the appeal. According to the applicant, he subsequently received the consent of His Majesty to use the same on 2 December 2024. (See para. 7a)

(iii) that His Majesty had informed him that the signed copy of the Addendum was duly handed to the then Attorney General, Tan Sri Ahmad Terrirudin bin Mohd Salleh. (See para. 6)

[32] In light of the above, we shall first deal with the following issues:

Whether The Applicant Has Satisfied The Rule In *Ladd v. Marshall* (*supra*)

[33] As stated earlier, there are three conditions that must be fulfilled by the appellant in order for fresh evidence to be admissible at the appeal:

(i) firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) secondly, the evidence must be such that, if given, it would probably, have an important influence on the result of the case, although it need not be decisive; and

(iii) thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, although it need not be incontrovertible.

Did The Appellant Pursue The Evidence Concerned, *ie*, The Adendum Order, With Reasonable Diligence For Use At The Trial?

[34] We are of the view that the appellant *via* his solicitors had exercised reasonable diligence in their attempt to obtain a copy of the addendum order. This finding is supported by the fact that they had written to all respondents seeking the same.

[35] The appellant in fact attempted to introduce the said document for purposes of the leave application for judicial review *vide* the affidavits of YAB Dato' Seri Ahmad Zahid and YA Dato' Seri Haji Wan Rosdy who said that they had seen a copy of the addendum order in YB Tengku Zafrul's mobile phone. This attempt proved futile.

[36] On 17 August 2024, His Majesty requested for Mohamad Nizar to seek an audience. It was only upon the latter's audience with His Majesty that the appellant managed to get a copy of the addendum order dated 29 January 2024. Even that came with a caveat that the same cannot be used in court without the consent of His Majesty.

[37] Without the consent of His Highness the Sultan Pahang, it was not possible for the applicant to file the addendum into court nor can the applicant compel His Majesty to furnish the said addendum. The fact that the applicant did not write to His Majesty earlier is a non-starter in light of the fact that the YDPA is neither a member of the Executive nor the administration and therefore not duty bound to reply to such a request.

[38] Finally, on 2 December 2024, His Majesty gave consent for the appellant to use the copy of the addendum order in court. This prompted the filing of encl. 26.

[39] Based on the matters stated in paras. [33] to [37], we are therefore of the view that the appellant had taken all reasonable steps to procure the same without delay.

Would The Copy Of The Addendum Order, Have An Important Influence On The Result Of The Case, Although It Need Not Be Decisive?

[40] Our answer to this question is in the affirmative. It is our considered view that had a copy of the addendum order given by His Majesty the Sultan of Pahang to Mohamad Nizar been exhibited in support of the appellant's leave application for judicial review, it would have warranted a careful consideration by the HCJ. In other words, the leave application would have merit and necessitated serious consideration, and, not grounded on pure hearsay or was frivolous although not necessarily resulting in the case being decided in favour of the appellant.

The Evidence Must Be Such As Is Presumably To Be Believed Or In Other Words, It Must Be Apparently Credible, Although It Need Not Be Incontrovertible

[41] With reference to the above third condition, we find the copy of the addendum order as exhibited in encl. 27 as credible.

[42] In opining so, we find the fact there is no rebuttal affidavit from the respondent challenging the existence nor the authenticity of the copy addendum order and rather disturbing as the Senior Federal Counsel (SFC) representing the respondents, Encik Syamsul Bolhassan, had on 5 December 2024 informed this panel that the respondents were seeking for time for the purpose of verifying the copy of the addendum order filed *vide* encl. 29 as the said addendum order was not a signed copy.

[43] In answer to our question as to whether they are challenging the contents of the affidavit in support, the SFC answered that the respondents are taking the stand that, firstly, the applicant's application is rather late and does not comply with the test in *Ladd v. Marshall* (*supra*) and secondly, the addendum order has no force as it was made outside the Pardons Board meeting of 29 January 2024.

[44] Given the fact that the affidavit in support had clearly stated that the deponent was informed by His Majesty that the original signed copy of the addendum order was given to the then Attorney General on 29 January 2024 itself (see para. 6 of encl. 29), we find that the answer given by the learned SFC is rather damning for the following reasons:

(i) the failure to challenge the above averment tantamount to an admission by the respondent that the original addendum order exists and hence was not frivolous. Support for this finding can be found in the Court of Appeal decision of *Ng Hee Thoong & Anor. v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 where Gopal Sri Ram JCA as he then was held that, "where one party makes a positive assertion, upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted" (see also *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45).

(ii) having initially taken the position that the applicant's leave application contains pure hearsay, is vexatious and frivolous, and, did not meet the minimum threshold of reliability, the respondents ought not to be permitted to now change their position by saying, '**Yes, the addendum order exists but you are barred from relying on it due to lateness**' (emphasis added). This was indeed a clear example of lack of candour and lack of understanding on the duty of candour on the side of the respondents. In other words, there was a non-disclosure or suppression of evidence on the existence of the addendum order, which was vehemently argued as hearsay *ie*, based on evidence which is not credible.

(iii) whilst, we do take cognisance that the respondent had also taken the position that there is no duty on them to produce the addendum order, to say that the appellant's leave application was frivolous, despite the third respondent having full knowledge that the document sought exists as the said addendum order was sent and personally addressed to the third respondent's office, is simply wrong. Had the truth been told about the existence of the addendum order, there would have been no necessity for the High Court and this panel to go through the painstaking process of determining on the issue of hearsay.

(iv) in this regard, we echo the statement of Nalini Patmanathan FCJ in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises* (*supra*) at para. 543: "Public authorities act in the public's interest. As such a public authority owes a duty of candour in judicial review proceedings to make full and fair disclosure of all relevant materials".

> 544. This duty of candour is a duty that the public authorities should exercise, not least because they are expected to assist the court with 'full and accurate expectations of all the facts relevant to the issue which the court must decide' and that this duty extends to disclosure of all 'materials which are reasonably required for the court to arrive at an accurate decision'.
>
> 545. We cite with approval from *R (on the application of Bancoult (No 2)) v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35:
>
> DUTY OF CANDOUR
>
> [183] A respondent's duty of candour in judicial review proceedings is summarised at p 125 of *Fordham's Judicial Review Handbook* (Sixth Edition 2012):
>
> > A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted.
> >
> > .... *A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so.*
>
> [184] In *R (Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at para 50 Laws LJ said, "There is a ... very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide. "The duty extends to disclosure of "materials which are

> reasonably required for the court to arrive at an accurate decision" – *Graham v. Police Service Commission* [2011] UKPC 46 at para 18.
>
> The purpose of disclosure is to "explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure – *R (AHK) v. Secretary of State for Home Department (No 2)* [2012] EWHC 1117 at para 22.
>
> 546. As expressed in *R v. Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 at 945, it is for an applicant 'to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands.
>
> (emphasis added)

[45] Based on the third respondent's refusal to reply to the appellant's letter of 19 February 2024 seeking confirmation of the existence of the addendum order and the indirect admission that the addendum order was indeed issued by the then YDPA to the third respondent, we are constrained to state that the respondents are estopped and ought not to be permitted to insist that the appellant had failed to comply with the rule set out in *Ladd v. Marshall* (*supra*).

The Addendum Order Was Issued Post The Pardons Board Meeting On 29 January 2024

[46] As to the above second proposition taken by the learned SFC, we are of the view that the issue of whether the addendum order was deliberated at the Pardons Board meeting is not to be decided by us at this appeal against the decision of the High Court in dismissing the leave application for JR stage. Rather the issue to be decided is whether the addendum concerned exists or otherwise.

[47] In *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60, Gopal Sri Ram JCA (as His Lordship then was) cited with approval the following passage in the speech of Lord Diplock in *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p. 643:

> The whole purpose of requiring leave should first be obtained to make an application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of judicial discretion, to give him leave to apply for that relief.

[48] More importantly, we are of the considered view that the failure of the respondent to challenge the same means this court cannot simply ignore the existence of the order by the then YDPA.

[49] The facts of the present case which involves the liberty of the appellant is something that should not be taken lightly. The interest of justice therefore operates in favour of the appellant to have his application to introduce fresh evidence decided in his favour (see the Singapore Court of Appeal decision in *Anan Group (Singapore) Pte Ltd v. VTB Bank (Public Joint Syock Co)* [2019] SGCA 41.

[50] In the above premise, we find no necessity to deal with encl. 50.

Whether Leave Is Required To Introduce New Evidence At This Appeal Stage

[51] This is the second part of our analysis on encl. 26. According to the appellant, under s. 69(2) of the Courts of Judicature Act 1964 and r. 7(2) of the ROC, further evidence may be adduced without leave in interlocutory applications or where such matters occurred after the date of the impugned decision. In doing so, the appellant relied on the decision of the Singapore Court of Appeal case of *Gobi Avedian v. AG* [2020] SGCA 77 and *Krishnasamy Kuppusamy v. Pengarah Hospital Sultanah Aminah* [2023] CLJU 2226; [2024] 1 MLRA 344.

[52] The appellant contends that the dismissal of the leave application to commence judicial review is interlocutory and not a judgment after a full hearing on merits. Therefore, the addendum order which was received after the High Court's decision falls squarely within this category.

[53] The respondents' response to this position was that even if the affidavit filed for the leave application for judicial review may contain hearsay evidence it must pass the minimum threshold of reliability wherein:

(i) the applicant must identify the sources and grounds of the statement made in the affidavit; and

(ii) once the source is identified, the source must be prepared to take responsibility for the truth of what was said.

[54] According to the respondent, the affidavits relied upon by the appellant did not meet the minimum reliability requirement. Thus, the statements of information and beliefs averred become pure hearsay and should not be accepted to form the basis for the grant of leave for judicial review. Hence, the application crumbles for want of evidence. It is vexatious and frivolous as there is no arguable case. The appellant has failed to show that he had passed the threshold test and that there is indeed a genuine case for review.

A

Court's Analysis

[55] Having reviewed the authorities furnished by both parties, we are of the opinion that the leave application for judicial review is indeed an interlocutory application. The respondent had in fact in para. [27] of their written submission agreed to this position as re-produced below:

B

> 27. While it is trite that a leave application to commence judicial review proceedings under Order 53 of ROC 2012 *is interlocutory in nature*, the affidavit verifying facts in support thereof may not necessarily be so.
>
> For this, the AG relies on the Supreme Court case of *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 2 MLJ 442 at pp. 447-449 [TAB 12, IA(PN)] that held as follows:
>
> C
>
> > We are supported in our views regarding the requirements of the application for leave and the affidavit in support thereof under O. 53 r. 1(2) by the following passages in the book *Judicial Review* by Michael Supperstone QC and James Goudie QC which we thoroughly approve of ...
> >
> > D
> >
> > ...
> >
> > On the last question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p 357 para 2, and we agree:
> >
> > E
> >
> > > *It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. This has a possible significance in terms of whether hearsay material may strictly be admitted. The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the notice of motion and forms the first basis of the applicant's case in the substantive application.*
> > >
> > F
> >
> > (emphasis added)

[56] As the application falls squarely within the provisions of s. 69(2) CJA and r. 7(2) RCA, leave to adduce fresh evidence would not be necessary.

G

Pronouncement For Enclosure 26

[57] For the above reasons, we are minded to allow encl. 26.

Main Appeal

H

[58] We now move on to the appeal proper. As stated earlier in para. [17] above, the learned HCJ's had dismissed the appellant's leave application for judicial review on the premise that:

(i) the appellant's application was based on hearsay and inadmissible evidence; and

I

(ii) the appellant had failed to satisfy the criteria for the granting of an order for *mandamus* as they had failed to show that there is a legal duty on the Pardons Board to confirm the existence or produce any order wherein

the power of pardon is exercised and that the appellant has failed to show any failure on the part of the respondents, in particular the Pardons Board, to perform any statutory duty compelled to them in law.

Summary Of The Appellant's Submission For The Appeal

[59] Based on the appellant's written submission, there are only two issues for determination at this appeal stage. Firstly, whether the threshold for leave to commence judicial review has been met (the appellant of course contended that they met the threshold for obtaining such leave).

[60] Secondly, whether the affidavits by the appellant and the deponents are admissible and not hearsay.

Summary Of The Respondents' Submission For The Appeal

[61] In opposing the appeal, the respondent's submission can be summarised as follows:

(i) there is no arguable case as the application for leave is speculative in nature as prayer 2 of the same, is dependent on the existence of the addendum order which the appellant himself is unsure of its existence. Hence, the application is unarguable or groundless (reliance placed on the case of *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73; [2020] 3 MLJ 114);

(ii) the ultimate subject matter of the application is non-justiciable to judicial review as it attempts to traverse beyond or behind the express words of the main order dated 29 January 2024 which is the "high prerogative exercisable" by the YDPA (reliance placed on the Supreme Court decision in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293; [1985] 2 MLJ 385, the Federal Court decision in *Juraimi Husin v. Pardons Board Of State Of Pahang & Ors* [2002] 4 CLJ 529; [2002] 4 MLJ 529; the Court of Appeal decisions in *Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 CLJ 87; [2020] MLJU 2201 and *Datuk Seri Anwar Ibrahim v. Mohd Khairul Azam Abdul Aziz & Another Appeal* [2023] 2 CLJ 236; [2023] 2 MLJ 545); and

(iii) the application framed by the appellant/applicant is frivolous and vexatious based on the following reasons:

(a) the appellant had not fulfilled the criteria of *mandamus* to compel the respondents to produce or verify the existence of the main/addendum order;

(b) the appellant's affidavit verifying facts and other affidavits contained pure hearsay which is insufficient to support the leave application to commence judicial review;

(c) there is no arguable case and that the application is speculative in nature; and

(d) the ultimate subject matter of the application is non-justiciable to judicial review.

Principles Governing The Grant Of Leave For Judicial Review

[62] The test applicable in determining the grant or otherwise of the leave for judicial review was laid down in the following cases:

(a) *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 at p. 484 (CLJ); p. 303 (MLJ) (Federal Court)

> ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the *leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome*. A rider must be attached to the application though *ie*, *unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged*.
>
> [13] Returning to the mainstream, *the appeal before us relates to the first stage ie the leave application*. With both the High Court and the Court of Appeal having rejected the leave application, we now begin by resolving certain preliminary matters, namely *whether the applicant has the necessary locus standi, whether it has complied with the time factor, and whether the facts and circumstances before us are amenable to judicial review.*
>
> (emphasis added)

(b) *Dato' Sri Mohd Najib Tun Hj Abdul Razak v. Peguam Negara & Ors And Another Appeal* [2020] 2 CLJ 73; [2020] 3 MLJ 114 at p. 84 (CLJ); p. 129 (CLJ) COA:

> [33] A court hearing a judicial review application must **determine whether '*prima facie* there is a genuine case for review'**. It is accepted that the threshold requirement is low, for leave will only be refused where an application is:
>
> (a) frivolous and vexatious or hopeless;
>
> (b) made by busybodies with misguided or trivial complaints of administrative errors;
>
> (c) misconceived;
>
> (d) unarguable or groundless;
>
> (e) where there is a more appropriate alternative procedure; or
>
> (f) where an application for judicial review is an inappropriate procedure.
>
> (emphasis added)

[63] Upon our review of the appeal record, cause papers and submission by both parties, we find that the appellant's case is one which the appellant clearly has locus to file, not frivolous or vexatious and indeed worthy of consideration given the fact that the addendum order affects the appellant's personal liberty pursuant to the powers conferred by the Federal Constitution on the YDPA. In other words, the appellant's rights were infringed due to the fact that the addendum order mandated for him to serve the remainder of his imprisonment sentence at home. We also find that there is no other alternative procedure to ventilate his pursuit of freedom from incarceration at Kajang Prison.

[64] This leaves us with the question of whether the subject matter of the application is not amenable to judicial review and/or is non-justiciable.

Whether The Subject Matter Of The Application For Leave Is Subject To Judicial Review

[65] To begin with, we have no reason to disagree with the principles propounded in the cases relied upon by the learned counsel by the respondents to support its contention that the heart of the appellant's plaint is non-justiciable as it attempts to question the power of pardon of the YDPA under art. 42 of the Federal Constitution. In fact, we acknowledge that under the doctrine of *stare decisis* as set out in *Young v. Bristol Aeroplane* [1944] KB 718 ("*Young v. Bristol Aeroplane*") which was affirmed by the Federal Court in Malaysia through the judgment in the case of *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645; [1998] 1 MLJ 1, we are bound by the Supreme Court decision in *Sim Kie Chon v. Superintendent Of Pudu Prison* (*supra*), the Federal Court decision in *Juraimi Husin v. Pardons Board, State Of Pahang & Ors* (*supra*); the Court of Appeal decisions in *Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* (*supra*) and *Datuk Seri Anwar Ibrahim v. Mohd Khairul Azam Abdul Aziz & Another Appeal* (*supra*).

[66] We however take the view that the appellant's application for leave is not one that questions the power of pardon of the YDPA. Instead, it seeks clarification on the following (see appellant's submission):

(i) is the power of pardon a royal prerogative, a personal discretion of the Yang Di-Pertuan Agong ("YDPA"), or A Ruler or Governor of the respective State and therefore unfettered and unchallengeable in any court?

(ii) is the advice provided by the respective Pardons Board binding on the Monarch, Ruler or Governor?

(iii) the relationship between the Monarch or the Governor and their respective Pardons Board and how is the meeting conducted and how is the decision reached?

A (iv) is the Monarch/Governor a part of the Pardons Board or distinct from the Pardons Board?

(v) must the Monarch/Governor discuss the tentative specific reliefs of Pardon at the Pardons Board. Must the decision be announced at the Pardons Board or is it sufficient for any orders following the Pardons
B Board advice for the Monarch/Governor to embody his orders in a written decree?

(vi) is there any effect to a written decree of the Monarch/Governor even if there were irregularities in the procedure employed at the Pardons
C Board?

[67] To our minds, the above issues are clearly neither frivolous nor vexatious. In fact, it calls for further investigation by way of a substantive hearing where all related evidence and arguments required can be presented and heard. Hence, leave for judicial review ought to be granted.

D **Whether The Appellant Has Fulfilled The Criteria Of *Mandamus* To Compel The Respondents To, *Inter Alia*, Produce Or Verify The Existence Of The Addendum Order**

[68] This is the last issue for consideration in this appeal. As stated earlier, the respondents took the position that there is no legal duty on their part to
E produce or verify the existence of the addendum order. As there is no omission of duty by the respondents, the appellant's application is frivolous and vexatious.

[69] It would therefore be most appropriate to summarily set out the
F principles governing the grant of an order for *mandamus* at this juncture.

Principles Governing The Grant Of An Order Of *Mandamus*

[70] For this purpose, guidance can be found in the case of *Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj* [2011] 9 CLJ 645; [2012] 1 MLJ 179 at pp. 656 to 657 (CLJ); pp. 188 to 189 (MLJ), where the Court of
G Appeal stated the following:

> [29] *In an application for an order of mandamus, these five conditions are cumulative. All of them must be satisfied*. In Koon Hoi Chow, Sharma J enunciated the following principles:
>
> H (a) *An order under s. 44 is in its nature an order of mandamus. It is a peremptory order of the court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is* sought;
>
> I (b) the *prerequisites essential to the issue of an order under s. 44 or of a mandamus* are:
>
> (i) Whether the applicant in the High Court *has a clear and specific legal right to the relief sought*;

(ii) *whether there is a duty imposed by law on the public officer(s)*;

(iii) *whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s)*;

and

(iv) *whether the applicant has any remedy, other than by way of mandamus, for the enforcement of the right which has been denied to him*.

(c) These are the questions, but only some of the questions, which are necessary to be answered in every application for *mandamus*. *The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy*. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

(emphasis added)

Note: See also *See Choo v. Suruhanjaya Sekuriti* [2005] 2 CLJ 20; [2006] 1 MLJ 649; *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179; *PP v. Soon Seong Sia Heng & Other Cases* [1979] CLJU 81; [1979] 1 LNS 81; [1979] 2 MLJ 170.

[71] For clarity, the provisions of s. 44(1) of the Specific Relief Act 1950 (Act 137) is re-produced below:

PART II - SPECIFIC RELIEF

CHAPTER VIII - ENFORCEMENT OF PUBLIC DUTIES

44. (1) *A Judge may make an order requiring any specific act to be done* or for borne, *by any person holding a public office*, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

Provided that

(a) *an application for such an order be made by some person whose* property, franchise, or *personal right would be injured by the forbearing or doing*, as the case may be, of the said specific act;

(b) *such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person* or court *in his or its public character*, or on the corporation in its corporate character;

(c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;

(d) the applicant has no other specific and adequate legal remedy; and

(e) the remedy given by the order applied for will be complete.

(emphasis added)

[72] With reference to the five conditions as set out in the case of *Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj* (*supra*) and s. 44 of the Specific Relief Act, our findings are as follows:

Condition 1

Whether the applicant in the High Court has a clear and specific legal right to the relief sought?

Answer:

Our answer to this query is two folds. Firstly, as the existence of the addendum order can no longer be refuted, the orders therein does have effect on the appellant's personal rights. That being the case, he is clearly entitled to seek an order of *mandamus* to compel the authorities concerned to furnished him with a copy thereof.

Secondly, the issue of whether the appellant is entitled for an order of *mandamus* to compel the authorities concerned to carry out the terms of the addendum order would depend on the outcome of the judicial review hearing. In the event the High Court finds that the addendum order is valid, the applicant (in this case the appellant), would have a clear and specific legal right to the relief sought.

Condition 2

Whether there is a duty imposed by law on the public officer(s)?

Answer:

Our reading of Article 42 of the Federal Constitution finds that the provision thereof does not spell the format as to how the YDPA (or the Ruler of the State as the case maybe) is to exercise such powers. The provision is also silent as to who is or are the designated body(ies) who are to exercise or to carry out the orders if made by the YDPA.

Notwithstanding the lack of such provision, we are of the view that His Majesty's orders which was carried out pursuant to the powers conferred to the YDPA under Article 42 of the Federal Constitution are not merely administrative decrees. It reflects the legal and moral authority vested in the YDPA. Once the addendum order is issued, all persons concerned and/or connected and having knowledge of the terms of the said orders are under a legal duty to execute and/or enforce the terms thereof.

From the narration of Mohamad Nizar in encl. 29, the addendum order was issued by the YDPA on 29.1.2024 to the third respondent. This averment was not refuted by the respondents. Most importantly, it was not refuted by the third respondent who is a member of the Pardons Board which was convened on 29 October 2024. Having received the addendum order from His Majesty, the third respondent was obligated to inform the Pardons Board and its members for purposes of ensuring that the terms of such order is executed. This duty is implied as Article 42 of the Federal Constitution as stated earlier is silent as to who is to execute or out carry out the performance of any order/s made by the YDPA thereunder.

Similarly, the third respondent or the Pardons Board as the case maybe, was under a duty to inform the appellant of the outcome of his petition for pardon to the then YDPA regardless of whether it was successful or otherwise.

Given the fact that both the terms of the main order and the addendum order affect the personal rights of the appellant, we are constraint to hold that the third respondent therefore was under a duty to reply to the appellant's letter of 14 February 2024.

Our view above is again fortified by the Federal Court decision in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises* (*supra*) where Nalini FCJ referred to the decision of Gibbs CJ in *Public Service Board of New South Wales v. Osmond* [1986] 159 CLR and concluded that where there is no statutory provisions to give reasons, there are exceptional circumstances that requires authorities to give reasons for its decision (see para 515-517 of the judgment), by way of **an implied statutory duty if it involves** environment matters or **special circumstances that adversely affect other person's property, right or legitimate expectations**.

In so far as the facts before us is concerned, not only did the respondents not reply on their noncompliance with the addendum order of the then YDPA, they also refused and/or failed to reply to the appellant's query on the existence of the said addendum order.

Condition 3

Whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s)?

Answer:

Based on the decision in the cases of *Sim Kie Chon v. Superintendent of Pudu Prison* (*supra*), *Juraimi bin Husin v. Pardons Board, State of Pahang & Ors* (*supra*), *Tan Sri Musa bin Haji Aman & Ors v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruddin & Ors* (*supra*) and *Datuk Seri Anwar bin Ibrahim v. Mohd Khairul Azam bin Abdul Aziz And Another Appeal* (*supra*), there is indeed no room for the exercise of discretion on the part of the public officer concerned ie, the third respondent.

Condition 4

Whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him?

Answer:

Our answer to this question would be in the negative as the applicant had exhausted all other legal avenues possible in the context of the conviction and sentenced pronounced by the courts of law against him.

Condition 5

Whether the applicant has shown that not only he has a legal right to have the act performed but that right is so clear and well defined as to be free from any reasonable controversy?

Answer:

A Our answer to this issue is in the affirmative. We opine so as the right to obtain a royal pardon for all convicted felons including the appellant in this case is clearly enshrined in Article 42 of the Federal Constitution. It is axiomatic that, upon a pardon being granted by the YDPA or the Ruler of the State, any applicant as the case may be, has a legal right to have the same being carried out and/or performed by the authorities
B concerned.

(emphasis added)

Conclusion

[73] Premised on the new evidence admitted by the applicant, we find that
C the issue of hearsay can no longer stand.

[74] It must be borne in mind that an applicant in a leave application for judicial review only needs to show that he or she has a good arguable case, premised on the fact that his or her interest or rights have been aggrieved. Based on the facts before us, it is crystal clear that the failure of the third
D respondent to carry out the terms of the addendum order has aggrieved the interest and rights of the appellant.

[75] We hereby order the matter to be remitted to the High Court for the hearing of the substantive judicial review application.

E **Azizah Nawawi JCA (dissenting):**

Introduction

[76] This appeal is against the decision of the learned High Court Judge dated 3 July 2024, dismissing the appellant's leave application to commence judicial review proceeding, essentially seeking an order of *mandamus* to
F compel all or any of the respondents to do the following acts:

(i) answer and/or confirm the existence of an addendum order dated 29 January 2024 decreed by His Majesty Seri Paduka Baginda Yang Di-Pertuan Agong XVI ("His Majesty YDPA XVI"), a supplementary order
G to the main order dated the same, which ordered the appellant to serve the reduced term of imprisonment under house arrest or to terms to the equivalent effect;

(ii) should the addendum order exists, the appellant is to be removed from the Kajang prison facility to his known residence(s) in Kuala Lumpur
H where the appellant would continue to serve his imprisonment sentence under house arrest;

(iii) to provide an original version or copy of the main order dated 29 January 2024; and

I (iv) to provide an original version or copy of the addendum order dated 29 January 2024.

The Background Facts

[77] From the submissions of parties, the background facts disclosed that on 4 July 2018 and 8 August 2018, the appellant was charged in the Kuala Lumpur High Court bearing Criminal Suit No(s): WA- 45-2-07/2018; WA-45-3-07/2018; and WA-45-5-08/2018, commonly known as the 'SRC cases' where he was found guilty of all charges.

[78] On 30 July 2020, the appellant appealed to the Court of Appeal against the decision of the learned High Court Judge. His appeal was dismissed by this court on 8 December 2021. Consequently, the conviction and sentence of 12 years' imprisonment and RM210 millions of fine against him were affirmed by this court.

[79] On 8 December 2021, the appellant appealed to the Federal Court against the decision of this court. On 23 August 2022, his appeal against both conviction and sentence were dismissed by the apex court.

[80] Following the decision of the Federal Court to affirm both the conviction and sentences imposed on the appellant, the appellant was brought to Kajang Prison to serve his imprisonment sentence. The appellant remained under the jurisdiction of the second respondent hitherto.

[81] On 1 September 2022, the appellant through his solicitors Messrs Shafee & Co, filed a petition to His Majesty YDPA XVI for a complete and/or full pardon against the conviction and sentence of the SRC case pursuant to, *inter alia*, art. 42 of the Federal Constitution.

[82] Subsequently, on 18 October 2022 and 20 April 2023, the appellant filed further petitions to His Majesty YDPA XVI consideration.

[83] On 2 February 2024, the fourth respondent under the purview of the fifth and the sixth respondents announced that His Majesty YDPA XVI had convened the 61st Pardons Board for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. The initial date of 8 December 2023 was then adjourned to the 15 January 2024. This was subsequently adjourned to 29 January 2024. During this sitting of the Pardons Board on 29 January 2024, the imprisonment term of the appellant was reduced to six years (from 12 years) and the fine was reduced to RM50 million (the 'Pardons order'):

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I

PERINTAH PEMBEBASAN AWAL

KEBAWAH DULI YANG MAHA MULIA
SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG
AL-SULTAN ABDULLAH RI'AYATUDDIN AL-MUSTAFA BILLAH
SHAH IBNI AL-MARHUM SULTAN HAJI AHMAD SHAH
AL-MUSTA'IN BILLAH
Yang di-Pertuan Agong XVI

Kepada:

Ketua Pengarah Penjara Malaysia
dan Sekalian Yang Menerima Surat Ini;

BAHAWASANYA dalam perbicaraan Wilayah Persekutuan (Perbicaraan Jenayah No.: WA-45-2-7/2018, Perbicaraan Jenayah No.: WA-45-3-7/2018 dan Perbicaraan Jenayah No.: WA-45-5-8/2018, di hadapan Mahkamah Tinggi Malaya di Kuala Lumpur, **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK (NO. K/P:530723-06-5165)** telah dituduh dengan kesalahan di bawah seksyen 23 dan boleh dihukum di bawah seksyen 24 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694], kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum dengan seksyen yang sama, kesalahan di bawah seksyen 4(1)(b) dan boleh dihukum di bawah seksyen 4(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan telah dijatuhkan hukuman penjara secara kumulatif selama tujuh belas (17) tahun mulai daripada tarikh keputusan Mahkamah Persekutuan iaitu pada 22 Ogos 2022.

BAHAWASANYA pada 28 Julai 2020, di hadapan Mahkamah Tinggi Kuala Lumpur **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** telah didapati bersalah terhadap semua pertuduhan di dalam ketiga-tiga perbicaraan jenayah tersebut dan memerintahkan kesemua hukuman dijalankan secara serentak. Di hadapan Mahkamah Tinggi Kuala Lumpur membenarkan penangguhan hukuman penjara dan denda tersebut sementara menunggu rayuan.

BAHAWASANYA pada 8 Disember 2021, di hadapan Mahkamah Rayuan telah menolak rayuan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** dan mengekalkan keputusan Mahkamah Tinggi.

BAHAWASANYA pada 23 Ogos 2022, di hadapan Mahkamah Persekutuan telah menolak rayuan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** dan mengesahkan keputusan Mahkamah Tinggi seperti mana yang dikekalkan oleh Mahkamah Rayuan.

BAHAWASANYA dalam perbicaraan Wilayah Persekutuan (Perbicaraan Jenayah No.: WA-45-2-7/2018), **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** juga ingkar membayar denda sebanyak RM210,000,000.00, maka secara kumulatif hukuman penjara yang dijatuhkan adalah selama tujuh belas (17) tahun mulai daripada tarikh keputusan Mahkamah Persekutuan iaitu pada 22 Ogos 2022 ke atas **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK**.

BAHAWASANYA Lembaga Pengampunan bagi Wilayah-Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya kali ke-61 melalui Perkara 42 di bawah Perlembagaan Persekutuan pada 29 Januari 2024 menimbang hukuman banduan dan menasihatkan Seri Paduka Baginda Yang di-Pertuan Agong supaya banduan **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK** meneruskan baki hukuman;

DAN BAHAWASANYA adalah munasabah pada hemat Beta, belas kasihan patut diberi kepada **DATO' SRI MOHD NAJIB BIN TUN HAJI ABDUL RAZAK**;

MAKA, OLEH YANG DEMIKIAN, Beta, Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah, Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong XVI, pada menjalankan kuasa yang terletakhak pada Beta oleh Perkara 42 Perlembagaan Persekutuan dan semua kuasa lain yang membolehkan bagi maksud itu ADALAH DENGAN INI MEMERINTAHKAN bahawa **DATO' SRI NAJIB BIN TUN HAJI ABDUL RAZAK dibebaskan pada tarikh pembebasan awal iaitu 23 Ogos 2028 dan denda dikurangkan kepada RM50,000,000.00. Sekiranya denda tidak dibayar, tempoh penjara bagi DATO' SRI NAJIB BIN TUN HAJI ABDUL RAZAK ditambah selama setahun dan tarikh pembebasan adalah pada 23 Ogos 2029.**

PADA MENYAKSIKAN YANG TERSEBUT DI ATAS Beta telah menurunkan tandatangan dan cop Mohor Beta pada 29 JAN 2024

DENGAN TITAH PERINTAH BAGINDA,

(YB DR. ZALIHA MUSTAFA)
Menteri di Jabatan Perdana Menteri
(Wilayah Persekutuan)

[84] On 12 February 2024, the appellant claimed to have received clear and reliable information that in addition to the Pardons order dated 29 January 2024, His Majesty YDPA XVI had issued an addendum order (the "addendum order") stipulating that the appellant be allowed to serve the reduced sentence of his imprisonment under "home arrest," instead of incarceration in Kajang Prison.

[85] The appellant then instructed his solicitors to confirm the details of the addendum order with the Attorney General of Malaysia (third respondent) by way of a letter dated 14 February 2024.

[86] *Vide* a letter dated 22 March 2024, the matter was referred to the Minister of Home Affairs (first respondent), *inter alia*, on the existence and enforcement of the addendum order. Similarly, the matter was also brought to the attention of the Pardons Board for the Federal Territories of Kuala Lumpur, Labuan, and Putrajaya, the Minister of the Prime Institutional Reform and the Director-General of the Legal Affairs (the fourth, fifth and sixth respondents respectively), on 29 March 2024.

[87] On 19 February 2024, the appellant's solicitors also requested the original copy or a copy thereof of the Pardons order from the Kajang Prison.

[88] Consequently, on 1 April 2024, the appellant filed the Leave application in court seeking several *mandamus* orders.

Judicial Review

[89] In addition to its original and appellate powers, the High Court in Malaysia has additional powers under s. 25(2) of the Courts of Judicature Act 1964 ("CJA"), as listed in the Schedule of the CJA. Paragraph 1 of the Schedule incorporates the common law prerogative orders, which make up the High Court's supervisory jurisdiction. Paragraph 1 provides wide powers to the High Court in its supervisory jurisdiction to issue to any person or authority orders in the nature of *certiorari*, *mandamus*, prohibition, *quo warranto* or any orders for the enforcement of the rights conferred by Part II of the Federal Constitution or for any purpose.

[90] Judicial review is the process where the High Court supervises administrative and discretionary actions or decisions made by tribunals, persons or bodies charged with quasi-judicial functions, public acts or duties. The intention behind this jurisdiction is to protect against abuse and to ensure that the actions and decisions of these bodies or persons are in accordance with the law.

[91] In *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339, the Federal Court held as follows:

> Judicial review is a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This was because a core feature of the rule of law is the

> doctrine of separation of powers, a corollary to which is the concept of check and balance. Judicial review – whether constitutional review or statutory review – is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of Government can perform its constitutional function *vis-a-vis* the other branches of Government. The judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts.

Leave Application

[92] The procedural aspects of a judicial review application are governed by the Rules of Court 2012 ("ROC 2012"). Judicial review proceedings under O. 53 of the ROC 2012 consist of two stages, the leave stage and the substantive stage. The first stage requires the applicant to get the court's permission (leave) through an *ex parte* application. The second stage begins once leave is granted. The applicant must then give notice of the hearing using Form 110. In this regard, the Federal Court in *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193 stated as follows:

> the procedure relating to the filing of a judicial review application is set out in O. 53 of the RHC. An application for judicial review is a two-stage process. The first stage is the leave application and the second stage is the hearing of the substantive application arguments on its merits, should leave be granted.

The Purpose Of Leave Application

[93] The purpose of the leave application is for the court to ascertain if the application is clearly without merit, that the application is frivolous. For example, the court can refuse leave if the applicant has no real interest in the matter, if the application is filed out of time, or if it is against someone who cannot be sued, in matters enjoining judicial immunity or non-justiciability. (see *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] CLJU 76; [1989] 1 LNS 76; [1989] 3 MLJ 298; *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; *Ravindran P Muthukrishnan v. Malaysian Examinations Council* [1984] 1 CLJ 232; [1984] 1 CLJ (Rep) 320; [1984] 1 MLJ 168; *Wong Kin Hoong & Anor v. Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 CLJ 193; *Hj Salleh Jafaruddin v. Datuk Celestine Ujang & Ors* [1986] 2 CLJ 209; [1986] CLJ (Rep) 142; [1986] 2 MLJ 412).

[94] This was what this court held in the case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927:

> (1) Applications for leave under O. 53 are made – and they must be made – through a two-stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the

application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, *eg*, proceedings in Parliament. (paras 5 & 10)

Principles For Granting Leave

[95] To determine whether leave ought to be granted or not, the Federal Court in the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296 has provided the following guidance:

At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[96] Therefore, based on the materials presented, the court will grant leave if the applicant can show that there is an arguable case. In other words, there must be a reasonable basis to further examine the matter and consider granting the reliefs requested at the substantive stage. Thus, it is the function of the court in exercising its power to grant leave for judicial review to sieve through the application before it and determine that the application is not frivolous and vexatious and that there is an arguable case to merit further argument on the substantive motion.

[97] In summary, the principle that the court must consider when deciding on a leave application for judicial review is to grant leave if there is a point that deserves further examination with full evidence and legal arguments. The court will dismiss the application if there is clearly no arguable case.

Role Of Attorney General At Leave Stage

[98] The involvement of the Attorney General at the leave stage is expressly provided under O. 53 of the ROC 2012 which requires the applicant to serve the leave application, statement and affidavit to the Attorney General. Order 53 r. 3(3) of the ROC 2012 provides as follows:

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

[99] At the leave stage, the Attorney General was served not as a putative respondent, but in his official capacity under O. 53 r. 3(3) of the ROC 2012. When the Attorney General appears at the leave stage, the Attorney General does not appear on behalf of the putative respondents. While he has the option not to appear, once he choose to do so through the Senior Federal Counsel, the court is obligated to hear him. At this stage, the court does not evaluate the merits of the case; its role is only to filter out baseless applications and determine if there is an arguable case. The role of the Attorney General at the leave stage is only to assist the court in sieving out frivolous applications by appraising the court of any particular features of the case that would disqualify leave being granted.

[100] Therefore, there exists a valid legal basis for the requirement that the applicant must serve the cause papers on the Attorney General. This requirement is based on the principle that judicial review serves as a key instrument of public law, intended to regulate the actions of public bodies through proceedings instituted before the High Court exercising its original jurisdiction. Given that matters involving public bodies inherently raise issues of public interest, and that the Attorney General is constitutionally recognised as the guardian of public interest, this procedural rule designates the Attorney General as a nominal party to all judicial review proceedings. The underlying objective of this requirement is to afford the Attorney General an opportunity to examine the application and determine whether his intervention is necessary. (see *Kanawagi Seperumaniam v. Dato' Abdul Hamid Mohamad* [2004] 5 MLJ 495: *Messrs Tai Choi Yu & Co, Advocates v. Arifin Zakaria & Anor* [2020] 2 CLJ 508; [2020] 5 MLJ 207).

[101] Indeed the role of the Attorney General is to protect public authorities and institutions by stopping clearly baseless claims early, without requiring them to become involved in court cases, and to prevent disruption to public administration. In *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595; [2017] 4 MLJ 656, this court held as follows:

> [12] The respondents' argument on this point, we would say, was premised on the ground that the appellant had no *locus standi* to appeal as the appellant was not a party to the proceedings. *In our opinion, the appellant had locus standi and also a special right to appeal in the public interest. The appellant was undeniably a party at the leave application. His presence was required by law without being made a party to the proceedings*. The relevant provision is found in O. 53 r. 3(3) of the Rules of Court 2012 which states:
>
> > The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavit.
>
> This provision, in our judgment, makes it mandatory, as evident by the use of the word 'must', for the applicant to give notice of the application to, and at the same time lodge the statement and affidavit in, the

Attorney General's Chambers. A failure to comply with the mandatory requirement to serve the cause papers on the attorney general would result in the application being dismissed. *It also makes the attorney general the party representing the public interest at the point when the leave application is heard, hence, when he appears before the court at that stage, the court has to recognise his presence and has no jurisdiction not to hear him. The putative party, the EC, is not a party at that particular point. The appellant's position as guardian of public interest at this stage would necessarily include the right to appeal against an order granting leave*.

[13] Thus, in as much as the court had no jurisdiction not to hear the appellant when he appeared before the High Court at leave stage, the appellant should, as a necessary corollary, have the right to appeal to this court against the decision of the High Court to grant leave and when he does, this court has to hear him on the appeal … (emphasis added)

[102] At this preliminary leave stage, the Attorney General was served not as a putative respondent, but in his official capacity as the Attorney General pursuant to O. 53 r. 3(3) of the Rules of Court 2012. The law does not impose any obligation on the Attorney General to file an affidavit in reply at the leave stage. In *Peguam Negara Malaysia v. Chin Chee Kow* [2018] CLJU 1273; [2018] 1 LNS 1273; [2019] 1 MLJ 307, this court held as follows:

[16] On this first issue, we wholly agreed with the learned SFC that the *law does not require the attorney general to file any affidavit in reply at the leave stage. At the leave stage, the attorney general in this appeal was served not in his capacity as a respondent but in his capacity as the attorney general under O. 53 r. 3(3) of the Rules of Court 2012*. He could choose not to appear but when he appeared, through the learned SFC, the court had no jurisdiction not to hear him. The court was not concerned with the merit of the application as the leave stage was merely to sieve out frivolous application and to see whether the applicant had an arguable case.

(emphasis added)

Interlocutory Applications

[103] Before the hearing of the substantive appeal, we have to deal with two motions filed by the appellant.

Motion Dated 3 December 2024

[104] The motion dated 3 December 2024 is filed pursuant to s. 69 of the CJA and r. 7 of the Rules of the Court Appeal 1994 ("RCA") and/or in the inherent jurisdiction of the Court for the following reliefs/orders:

(i) that this court grants leave to the appellant to adduce additional evidence in the form of:

(a) the affidavit affirmed by Mohamad Nizar bin Mohd Najib, dated 2 December 2024; and

(b) the addendum order, issued by His Majesty YDPA XVI stating that the appellant is to serve his remaining reduced sentence under house arrest from 2 January 2024 until completion.

[105] The grounds in support of this notice of motion are as specified in the affidavit in support of Muhammad Shafee bin Abdullah. The brief grounds in support of the Motion are as follows:

(i) the additional evidence was not available during the High Court proceedings as the appellant's son, Mohamad Nizar bin Mohd Najib, only obtained the addendum order after the High Court decision on 3 July 2024.

(ii) Mohamad Nizar bin Mohd Najib only obtained His Majesty YDPA XVI's approval to disclose the addendum order on 2 December 2024, and the former had affirmed an affidavit on the same day.

(iii) the criteria for adducing additional evidence have been satisfied as established in *Ladd v. Marshall* [1954] 3 All ER 745, namely:

(a) that the evidence could not have been obtained with reasonable diligence for use at the trial (or appeal);

(b) the evidence, would probably have an important influence on the outcome of the appeal, though it need not be decisive;

(c) the evidence is credible and presumptively reliable, satisfying the standard required for admissibility, though it need not be incontrovertible.

(iv) the additional evidence will effectively disprove the High Court's findings that the appellant's application for judicial review was devoid of merit, being predicated on pure hearsay and a speculative endeavour. It will demonstrate that:

(a) the addendum order does exist;

(b) the appellant's application for leave for judicial review was meritorious; and

(c) leave for judicial review should have been granted.

[106] The addendum order that the appellant sought to be admitted as fresh evidence reads as follows:

Bismillahirrahma Nirrahim
Qaullahul – Haq

السلام عليكم ورحمة الله وبركاته

Waraqatul Ikhlas Watah Fatul Akhyar Iaitu daripada Beta, Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah, Yang di-Pertuan Agong Malaysia.

Mudah-mudahan barang diwasalkan oleh Tuhan Seru Sekalian Alam ke Majlis Yang Berbahagia Datuk Ahmad Terrirudin bin Mohd Salleh, Peguam Negara Malaysia yang berada pada masa ini di Pejabat Peguam Negara, Putrajaya dengan beberapa selamat dan sejahteranya.

Waba'dah Ehwal, Beta dengan ini menitahkan sebagai tambahan kepada keputusan Beta berhubung Banduan, Dato' Sri Mohd Najib bin Tun Haji Abdul Razak (530723-06-5165) pada Mesyuarat Lembaga Pengampunan Wilayah-Wilayah Persekutuan Kuala Lumpur, Labuan dan dan Putrajaya kali ke-61 pada hari Isnin, 29 Januari 2024 bersamaan 17 Rejab 1445 Hijrah supaya **Banduan, Dato' Sri Mohd Najib bin Tun Haji Abdul Razak (530723-06-5165) menjalani baki hukuman menerusi penahanan dalam rumah (*House Arrest*).**

Demikianlah sahaja Beta maklumkan. Beta dan Raja Permaisuri Agong berdoa kehadrat Allah S.W.T. semoga Yang Berbahagia Datuk, Yang Berbahagia Datin serta rakyat Beta keseluruhannya sentiasa dalam perlindungan serta rahmat-Nya.

Wabillahitaufiq Walhidayah, Wassalamualaikum Warahmatullahi Wabarakatuh.

Termaktub di Istana Negara
Jalan Tuanku Abdul Halim
50480 KUALA LUMPUR

Pada 29 Januari 2024M
17 Rejab 1445H

[107] In response to the appellant's first motion, an affidavit was affirmed by Senior Federal Counsel, Donald Joseph Franklin on 3 January 2025 to exhibit the 'Kenyataan Media' issued by Istana Negara dated 3 January 2025, which reads:

ISTANA NEGARA
JALAN TUANKU ABDUL HALIM
50460 KUALA LUMPUR

KENYATAAN MEDIA

Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong mempunyai kuasa prerogatif menurut peruntukan Perkara 42(1) dan (2) Perlembagaan Persekutuan untuk memberi ampun, tunda hukum dan lega hukum bagi apa-apa kesalahan yang dilakukan di dalam Wilayah Persekutuan Kuala Lumpur, Labuan dan Putrajaya.

Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong juga boleh meremit, menggantung atau meringankan apa-apa hukuman yang telah dijatuhkan oleh mahkamah bagi kesalahan tersebut.

Kuasa Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong ini dijalankan dengan nasihat Lembaga Pengampunan yang dipengerusikan oleh Seri Paduka Baginda.

Oleh itu, sekiranya mana-mana pihak ingin mencadangkan supaya mana-mana banduan untuk diberi keampunan atau pengurangan hukuman, permohonan berkenaan hendaklah dikemukakan oleh banduan berkenaan untuk dipertimbangkan oleh Lembaga Pengampunan yang dipengerusikan oleh Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong pada mesyuarat akan datang.

Semua pihak diingatkan untuk menghormati Perlembagaan dan undang-undang yang ditetapkan.

Istana Negara
3 Januari 2025

Amended Motion Dated 5 January

[108] Subsequently, the appellant filed the amended motion. The amended motion dated 5 January 2025 is for leave to adduce additional evidence in the form of:

(i) the affidavit affirmed by Mohamad Nizar bin Mohd Najib, dated 2 December 2024;

(ii) the affidavit No. 2 affirmed by Mohamad Nizar bin Mohd Najib dated 5 January 2025; and

(iii) the addendum order, issued by His Majesty YDPA XVI, stating that the appellant is to serve his remaining reduced sentence under house arrest from 2 January 2024 until completion.

[109] Under this amended motion, the additional grounds relied by the appellant are as follows:

(i) in spite of repeated attempts to obtain the additional evidence (*ie*, copy of the addendum order) earlier, the appellant was not successful in obtaining the same due to the sensitive nature of the additional evidence and the strict protocol of the matters involving the palace.

(ii) Mohamad Nizar Bin Mohd Najib only obtained the Kebawah Duli Paduka Baginda Sultan Pahang Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah ("KDPB Sultan Pahang") and/or YDPA XVI's approval to disclose the addendum order on 2 December 2024, and the former affirmed an affidavit on the same day. Prior to this date Mohamad Nizar Bin Mohd Najib was strictly not authorised to disclose the addendum order to anyone under the strict instructions of KDPB Sultan Pahang.

(iii) Mohamad Nizar Bin Mohd Najib had further obtained a letter by the KDPB Sultan Pahang/YDPA XVI on 5 January 2025 which is further confirmed by the Pengelola Bijaya Di-Raja of KDPB Sultan Pahang. This letter of confirmation was earlier sought by the appellant and Mohamad Nizar bin Mohd Najib to be released by the Palace of the KDPB Sultan of Pahang but was not successful until the 5 January 2025 when there was a change of stand from the Palace.

[110] *Vide* this amended motion, the appellant is also seeking to admit as fresh evidence, the letter issued by the Istana in Kuantan, Pahang, which reads:

مجلس كسلطانن ڤهڠ
MAJLIS KESULTANAN PAHANG

Ruj Kami: Bil.(8)dlm.SP/S/600/1/33/6
Tarikh : 4 Januari 2025
4 Rejab 1446 H

YB Dato' Mohamad Nizar bin Dato' Sri Mohamad Najib., DISAP.
Ahli Majlis Mesyuarat Kerajaan Negeri Pahang,
EXCO Pelaburan, Perindustrian, Sains, Teknologi dan Inovasi Negeri Pahang,
Aras 5, Blok B,
Pusat Pentadbiran Sultan Ahmad Shah (PPSAS),
25200 Kuantan,
Pahang Darul Makmur.

Yang Berhormat Dato',

TITAH ADDENDUM BERKENAAN PENAHANAN DALAM RUMAH (HOUSE ARREST) DATO' SRI NAJIB TUN RAZAK

Merujuk perkara di atas, saya dengan hormatnya memaklumkan bahawa Kebawah Duli Paduka Baginda Sultan Pahang Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Al-Marhum Sultan Haji Ahmad Shah selaku Yang di-Pertuan Agong ke-16 telah mentitahkan supaya Dato' Sri Najib Tun Razak menjalani baki hukuman pemenjaraan menerusi penahanan dalam rumah (House Arrest) melalui Titah Addendum bertarikh 29 Januari 2024.

2. Sehubungan dengan itu, melalui surat ini, saya bagi pihak Kebawah Duli Paduka Baginda Sultan Pahang selaku Yang di-Pertuan Agong ke-16 adalah dengan ini memperakukan bahawa Titah Addendum Kebawah Duli Paduka Baginda Tuanku termaktub adalah wujud dan sahih.

Sekian dimaklumkan. Terima kasih.

Saya yang menjunjung titah,

(DATO' HAJI AHMAD KHIRRIZAL BIN AB RAHMAN)
PENGELOLA BIJAYA DIRAJA
KEBAWAH DULI PADUKA BAGINDA SULTAN PAHANG

A **Decision On The Motions**

[111] The application to admit fresh evidence is made under s. 69(2) of CJA read with r. 7(2) of RCA. Section 69(2) CJA reads as follows:

> 69. Hearing of appeals
>
> B ...
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

C **[112]** Rule 7(2) of the RCA states:

> 7 Power of Court to amend, admit further evidence, or draw inferences of fact
>
> ...
>
> D (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, E and not without leave of the Court.

Filing Of Affidavits

[113] The first issue raised by the appellant is the failure of the Attorney General to dispute the Motion dated 3 December 2024 and the supporting F affidavits. After the appellant submitted the application for additional evidence, the Attorney General did not question the authenticity or accuracy of the addendum order, despite being another week to challenge the same by this court. Learned counsel submits that if the addendum order was fake or incorrect, then the Attorney General should have taken serious steps, such as filing a police report. This makes it reasonable to believe that the G addendum order is genuine. The appellant further submits that instead of taking a clear stance, the Attorney General has relied on a media release from the Istana Negara, which simply repeats the wording of art. 42 of the Federal Constitution.

H **[114]** However, I am of the considered opinion that the Attorney General is not in any position to respond to the affidavits affirmed in support of the two motions. This is simply because at the leave stage in the High Court and during the current appeal against the High Court decision to refuse leave, the Attorney General is not the putative respondent. At the leave stage (and during this appeal), the Attorney General was served not as a respondent I but in his official capacity under O. 53 r. 3(3) of the ROC 2012. There is

clearly no legal requirement for the Attorney General to file an affidavit in reply at this stage. (see *Peguam Negara Malaysia v. Chin Chee Kow* [2018] CLJU 1273; [2018] 1 LNS 1273; [2019] 1 MLJ 307). Therefore, the principle in the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 282, cannot be invoked against the Attorney General in the circumstances of this appeal.

Duty Of Candour

[115] It is also the submission of the learned counsel for the appellant that the Government and the Attorney General had breached their duty of candour in both their conduct before and during the court proceedings. As a result, the court has the authority to grant the appellant the requested reliefs, specifically the recognition and enforcement of the addendum order. Learned counsel relied on the Federal Court decision in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167; [2023] 3 MLJ 829 wherein Nallini Pathmanathan FCJ held as follows:

> [543] This duty of candour is a duty that public authorities should exercise, not least because they are expected to assist the court with 'full and accurate explanations of all the facts relevant to the issue which the court must decide' and that this duty extends to disclosure of 'materials which are reasonably required for the court to arrive at an accurate decision'.
>
> [544] We cite with approval from *R (on the application of Bancoult (No 2) v. Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35:
>
> > DUTY OF CANDOUR
> >
> > [183] A respondent's duty of candour in judicial review proceedings is summarised at p 125 of Fordham's Judicial Review Handbook (sixth Ed 2012):
> >
> > > A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted … A main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so.
> >
> > [184] In *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at para 50 Laws LJ said, 'There is a … very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue which the court must decide.' The duty extends to disclosure of

A 'materials which are reasonably required for the court to arrive at an accurate decision' – *Graham v. Police Service Commission* [2011] UKPC 46 at para 18. The purpose of disclosure is to 'explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public B interest immunity, may exclude their disclosure - *R (AHK) v. Secretary of State for Home Department (No 2)* [2012] EWHC 1117 at para 22.

[545] As expressed in *R v. Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 at p 945, it is for an applicant 'to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his C application if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands'.

[116] Therefore, based on the case cited above, it is the submission of learned counsel for the appellant that the law clearly states that public D authorities have a duty of candour, meaning that they must help the court by providing complete and accurate information about all relevant facts. This includes sharing any materials the court reasonably needs to make a fair and correct decision.

[117] However, the case of *Datuk Bandar Kuala Lumpur v. Perbadanan* E *Pengurusan Trellises & Ors And Others* (*supra*) is distinguishable, as that case is already at the substantive stage, and not at the leave application where the Attorney General is only the nominal party dealing with legal issues only. It must be reiterated that at leave stage, the Attorney General has no legal duty to file any affidavit to dispute the appellant's case. It is only after leave F has been granted that the Attorney General, as the third respondent in this case, after being served with the cause papers, must then file an affidavit in response to any allegation of fact raised by the appellant. The duty of candour only arises after the leave has been granted and all the respondents who have been served with the cause papers must respond to the allegation of facts G raised by the applicants accordingly. In fact, O. 53 r. 6 ROC 2012 allows the parties to file for an application for the discovery and inspection of documents after leave has been granted.

Whether Leave Is An Interlocutory Application

H **[118]** It is also the submissions of learned counsel for the appellant that an appeal from a dismissal of leave to commence judicial review proceedings is an interlocutory application. Therefore, pursuant to s. 69(2) of CJA read with r. 7(2) of RCA, leave of the court was not required for the admission of the affidavits and the addendum order.

I **[119]** The learned counsel relied on a recent decision of this court in *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah & Ors And Other Appeals* [2023] CLJU 2226; [2023] 1 LNS 2226; [2024] 1 MLRA 344 wherein Wong Kian Kheong JCA held:

(1) The three striking out applications were interlocutory proceedings within the meaning of O. 41 r. 5(2) of the Rules of Court 2012 (ROC 2012) from which the instant three appeals arose. Premised on *Tokai Corporation v. DKSH Malaysia Sdn Bhd*, O. 41 r. 5(2) of the ROC 2012 may be read with rule 4 of the RCA for the contents of Dr Selahuddeen's affidavit to be taken into account in the instant appeals. (paras 17-18)

(2) Pursuant to the second part of s. 69(2) of the Courts of Judicature Act 1964 read with the second part of rule 7(2) of the RCA, leave of the Court of Appeal was not required for the said affidavit of Dr Selahuddeen to be used in the hearing of appeals. In any event, the two conditions in r. 7(3A) of the RCA had been satisfied by the plaintiffs in that the said affidavit was not available to the plaintiffs during the hearing of the defendants' striking out applications, and that the contents of the said affidavit would have been likely to have had a determining influence on the High Court's decisions. Accordingly, the 3 leave applications ought to be allowed. (paras 22, 25, 26 & 27).

[120] However, I am of the considered opinion that the case of *Krishnasamy Kuppusamy & Anor v. Pengarah Hospital Sultanah Aminah* (*supra*) is clearly distinguishable, as that case involved striking out applications, based on issues of limitation. Reference was made to O. 41 r. 5(2) of the ROC 2012, which provides that "an affidavit sworn for the purpose of being used in interlocutory proceedings may contain information of belief with the sources and grounds thereof."

[121] Interlocutory applications are those made in the course of proceedings that do not determine the final rights of the parties. In judicial review proceedings, applying for leave is a preliminary step, as it determines whether the applicant can proceed with the substantive application for judicial review. The substantive judicial review is what will determine the final legal rights or obligations. The leave stage only filters out unmeritorious cases.

[122] However, where leave to commence judicial review has been refused by the court, it is no longer interlocutory as it was final in effect, because it conclusively determined that the applicant could not proceed with the substantive application. Therefore, although the application for leave is interlocutory in form, a refusal of leave will finally dispose of the proceeding.

[123] Added to that, the affidavits filed in support of the leave application will be the same affidavit used for the substantive application (see O. 53 r. 4(2)). Order 53 r. 3(2) ROC 2012 provides that an application for leave must be "supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on." Therefore, as opposed to O. 41 r. 5(2) of the ROC 2012, the affidavits affirmed for the purpose of judicial review application cannot be based on hearsay evidence.

Ladd v. Marshall Test

[124] Alternatively, it is the submission of learned counsel for the appellant that the conditions in r. 7(3A) of the RCA has been fulfilled by the appellant on the following basis:

(i) the additional evidence, specifically, the addendum was not available during the earlier proceedings and the appellant has exhausted all means possible to obtain the addendum through various correspondences even before the application for judicial review was filed;

(ii) the additional evidence would have an important influence on the result of this appeal; and

(iii) the additional evidence is credible.

[125] Learned counsel relied on r. 7(3A) of RCA, which states that the Court of Appeal has full discretionary powers to admit fresh evidence through oral examination, affidavits, or depositions. Such discretion is bound by the requirements laid down under para. (3A) as follows:

> 7. Power of Court to amend, admit further evidence, or draw inferences of fact
>
> (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or Commissioner.
>
> (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

[126] The power of the court to admit fresh, new or further evidence at the hearing of an appeal is governed by r. 7 of the RCA 1994 and the test as set out in r. 7(3A) of the RCA 1994 is a codification of the test laid down in *Ladd v. Marshall* [1954] 3 All ER 745. Section 69(1), rr. 7(1) and (3A) have

given statutory recognition to the principles enunciated in *Ladd v. Marshall* (*supra*): See *Datuk Seri Panglima Mohd Sari Datuk Hj Nuar v. Vee Seng Development Sdn Bhd & Ors* [2009] 6 CLJ 102; *Hue Ngee On v. Chai Woo Sien (Sebagai Pegawai Awam Persatuan Hakka Kulai, Johor)* [2009] 5 CLJ 734. A

[127] In *Ladd v. Marshall* (*supra*) Lord Denning at p. 748 laid down three conditions to justify the reception of fresh evidence in the following passage: B

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. C

[128] The principles in *Ladd v. Marshall* has been accepted by our apex court in *Chai Yen v. Bank Of America National Trust & Savings Association* [1980] CLJU 6; [1980] 1 LNS 6; [1980] 2 MLJ 142, where the Federal Court through the judgment of Chang Min Tat FJ said: D

> The principles to be applied for the reception of fresh evidence have been stated by Denning LJ (as he then was) in *Ladd v. Marshall* at p. 149: E
>
> > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly that evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible. F
>
> These principles as so stated have been consistently followed and have now received the approval of the House of Lords in *Skone v. Skone & Anor*. See also *Leng Lan (f) v. S.M. Yesudian* and *Shaik Sahied bin Abdullah Bajarie v. A.R.A. Mootoo Carpen Chitty* at page 21. G
>
> Enough, we think, has been said to show that the applicant could not have satisfied the first requirement. Failure to satisfy this first requirement is sufficient for the dismissal of the application: *Lau Foo Sun v. Government of Malaysia*. H

[129] In *Maxisegar Sdn Bhd v. Silver Concept Sdn Bhd* [2005] 3 CLJ 238; [2005] 5 MLJ 1, this court decided as follows:

> [4] The poser of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s. 69(3) of the Courts of Judicature Act 1964 and r. 7(3A) of the Rules Court of Appeal 1994 are generally known as the *Ladd v. Marshall* [1954] 3 All ER 745 conditions. It is settled by various decided cases that the three conditions are cumulative and I

conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted. The said three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v. Hooper & Co* [1965] CLJU 78; [1965] 1 LNS 78; [1965] 2 MLJ 148 at p. 148 as follows:

> It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v. Marshall*:
>
> > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.
>
> I pause to observe that these conditions are not alternative; they are cumulative.
>
> See also the judgment of *Suffian FJ in Lau Foo Sun v. Government of Malaysia* [1970] CLJU 56; [1970] 1 LNS 56; [1970] 2 MLJ 70 at p. 71 and *Chai Yen v. Bank of America National Trust & Savings Association* [1980] CLJU 6; [1980] 1 LNS 6; [1980] 2 MLJ 142 at p 143.

[130] According to the test (*Ladd v. Marshall*), the following three conditions have to be satisfied cumulatively before an appellate court may exercise its discretion to admit fresh evidence for the hearing of the appeal:

(i) the fresh evidence could not have been obtained with reasonable diligence for use at the court of first instance;

(ii) the fresh evidence would probably have an important influence on the result of the appeal, although it need not be decisive; and

(iii) the fresh evidence should be credible but need not be incontrovertible.

[131] Having considered the affidavits affirmed in support of both motions, I am of the considered opinion that the application for fresh evidence have satisfied condition (ii) and (iii) of *Ladd v. Marshall* (*supra*). I find that the proposed fresh evidence will have an important influence on the result of the appeal and that the fresh evidence is credible.

[132] The only issue here is whether the fresh evidence could not have been obtained with reasonable diligence for use at the High Court before the delivery of the decision on 3 July 2014. Reasonable diligence simply means the amount of effort, attention, and care that a person of ordinary prudence and intelligence would exercise under similar circumstances to obtain the addendum order.

[133] The appellant himself, in his affidavit verifying facts of the statement affirmed on 29 March 2024 stated as follows:

> Pada 12 February 2024, Pemohon telah menerima satu maklumat yang sahih sebagai tambahan kepada Titah Utama yang bertarikh 29 January 2024, Kebawah Duli Yang Maha Mulia Sri Paduka Baginda Yang Di-Pertuan Agong XVI juga telah mengeluarkan satu Titah Adendum yang menyatakan bahawa Pemohon dibenarkan untuk menjalani hukumannya yang dikurangkan kepada "tahanan di rumah" dan bukannya kepenjaraan di Penjara Kajang.

[134] Therefore, as early of 12 February 2024, the appellant had already received credible information that, in addition to the Pardons order dated 29 January 2024, His Majesty the YDPA XVI had also issued an addendum order stating that the appellant is allowed to serve his reduced sentence under "house arrest" instead of imprisonment at Kajang Prison. Since the appellant knew that the addendum order was issued by His Majesty YDPA XVI as early of 12 February 2024, no efforts were shown as to whether the appellant has tried to communicate with the Istana Negara or Istana Pahang on the addendum order.

[135] An affidavit in support was affirmed by Mohd Nizar bin Mohd Najib, who is a member of the Pahang State Executive Council ("EXCO"), responsible for the portfolio of Investment, Industrial Development, Science, Technology, and Innovation.

[136] In the affidavit affirmed by Mohd Nizar bin Mohd Najib on 2 December 2024, he has affirmed as follows in para. (22):

> 3. Didalam tugasan rasmi saya, saya kerap bermesyuarat dan/atau bertemu dengan Kebawah Duli Paduka Baginda Sultan Pahang Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah Ibni Almarhum Sultan Haji Ahmad Shah Al-Musta'in Billah ("KDPB Sultan Pahang"). KDPB Sultan Pahang juga merupakan Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong XVI ("YDPA XVI") pada tempoh 31hb Januari 2019 hingga 30hb Januari 2024.

[137] Therefore, the deponent has affirmed that he had frequently attended meetings with KDPB the Sultan of Pahang, who was also His Majesty the YDPA XVI. In light of the deponent's admission that he frequently holds meetings and engages with KDPB the Sultan of Pahang, it cannot be said that the fresh evidence could not have been obtained with reasonable diligence for use during the hearing before the learned High Court Judge. This is further evidenced by the fact that the deponent only obtained the addendum many months after the decision of the learned judge. Again the deponent has failed to explain why he did not make any attempt to communicate with the Istana Pahang on the addendum order before the learned judge delivered his decision on 3 July 2024.

[138] In both affidavits, Mohd Nizar bin Mohd Najib tried to explain how he obtained the addendum order from the Pahang Palace. However, all these events happen after the delivery of the learned Judge's decision. The meeting with KDPB the Sultan of Pahang on 4 August 20024, the meeting with the Comptroller of the Istana Pahang, Dato' Hj Ahmad Khirrizal Ab Rahman on 17 August 2024 and on 4 January 2025 are events that happen after the decision of the High Court. All these events do not explain the reason why no attempt was made to obtain the addendum order before 3 July 2024, as the appellant has already received credible information that His Majesty the YDPA XVI had also issued an addendum order.

[139] Despite the fact that the appellant hails from the state of Pahang where he was once the Menteri Besar, and the fact that his son is currently an Executive member of the State Government, the appellant has failed to explain how and why they failed to obtain the addendum order with reasonable diligence. I am of the considered opinion that the appellant has failed to take sufficient steps to pursue the addendum order from the Pahang Palace. This evidence could have been made available during the hearing if due diligence had been taken.

[140] For the aforesaid reasons, I am of the considered opinion that had the appellant exercised reasonable diligence by contacting either Istana Negara or Istana Pahang, the fresh evidence now sought to be adduced at the hearing of this appeal could have been obtained during the hearing of the leave application before the learned High Court Judge. I therefore find that there is no merit in the appellant's application to adduce the fresh evidence and the same was dismissed with no order as to costs.

Substantive Appeal

[141] With regard to the substantive appeal, the learned High Court Judge had dismissed the leave application and concluded that the appellant had not established the necessary requirements for the issuance of a *mandamus* order and dismissed the application based on two main reasons:

(i) hearsay evidence: The affidavits provided by the appellant contained hearsay evidence, which did not meet the minimum threshold of reliability. The affidavits were based on information from a third party, who did not affirm any affidavit to support the appellant's application. The learned judge held that the affidavits lacked direct knowledge and were therefore inadmissible.

(ii) no legal duty: There is no provision in any written law or the Federal Constitution that imposed a legal duty on the respondents to confirm the existence or produce any order wherein the power of pardon is exercised. *Mandamus* can only be granted when a legal duty is imposed on an authority, which was not the case here.

Hearsay Evidence

[142] Order 53 r. 3(2) ROC 2012 provides that an application for leave must be "supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on."

[143] It is also provided in O. 53 r. 4(2) ROC 2012 that the affidavits filed in support of the leave application will be the same affidavit used for the substantive application.

[144] Therefore based on O. 53 r. 3(2) read with r. 4(2), the affidavits affirmed for the purpose of judicial review application cannot be based on hearsay evidence.

[145] The learned judge has correctly referred to the Supreme Court decision in *Tuan Sarip Hamid & Anor. v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442, which had adopted the views of the learned authors of the book "judicial review", namely, Michael Supperstone QC and James Gourdie QC. On the question of whether hearsay material may be referred to in the affidavit in support of the application for leave to commence a judicial review application, the following passage in the said book was approved. This is what was said:

> On the last question whether hearsay material may be referred to in the affidavit in support of the application for leave, the learned authors have this to say at p. 357 para. 2, and we agree:
>
> > It is not entirely clear whether the affidavit in support of the application for leave should be regarded as interlocutory in character or otherwise. This has a possible significance in terms of whether hearsay material may strictly be admitted. *The application for leave itself is undoubtedly interlocutory; however, if leave is granted, the affidavit in support of the leave application is served together with the notice of motion and forms the first basis of the applicant's case in the substantive application*. As a matter of practice, a degree of common sense should be exercised in selecting the identity of the deponent. In cases where the attack is on the reasoning of a written decision as disclosing an error of statutory construction, it may be that fairly formal affidavit in support from a solicitor instructed in this case, exhibiting the decision and other essential material would suffice. At the other extreme, *in an Immigration case where the issue was whether as a matter of fact the immigrant was or was not an illegal entrant, it would be highly desirable if not essential to have direct evidence at the leave stage on the disputed facts from the immigrant himself.*
>
> (emphasis added)

[146] The Supreme Court added as follows:

> Having said that, we would add that for a lawyer drafting his application under O. 53 r. 1(2) to ensure that it contains substantial particulars of the facts and matters on which he intends to rely in support of his application.

He should also ensure that his affidavit in support of his application is as detailed and comprehensive as the circumstances will permit, and it should exhibit all the documentary exhibits. which are truly relevant and upon which he intends to rely. The object of these steps is to ensure that the court has as complete a picture as is possible right from the start, of the case for the applicant who is seeking judicial review.

In *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 3 MLJ 228, Ajaib Singh SCJ, speaking for the Supreme Court said this:

> The guiding principles ought to be that the applicant must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.
>
> *Moreover, as the application for leave is made ex parte, there is a duty of disclosure, imposed by law on the applicant, the breach of which may depending upon the importance of the non-disclosure the order for leave being set aside …*
>
> (emphasis added)

[147] As such I agree with the finding of the learned judge that in judicial review cases, unlike other interlocutory applications, the same affidavit is used both to verify the facts and to support the main application. Therefore, as decided by the Supreme Court in *Tuan Hj Sarip Hamid* (*supra*), although applying for leave to review is an interim step, the affidavit may still need to be based on direct knowledge, depending on what the case is about.

[148] Based on the factual matrix of this case, I agree with the learned judge that in order to obtain leave under O. 53 r. 3(2) ROC 2012, the appellant must file an affidavit that verifies the facts stated in the O. 53 statement.

[149] However in the present case, the appellant has filed two affidavits to support his application. In the first affidavit, the appellant averred as follows:

(i) paragraph 21:

> … His Majesty … had also immediately or simultaneously issued an addendum order on the same day which was within the powers and jurisdiction of His Majesty … The addendum order curiously was not announced by the fourth, fifth, and sixth respondent or by any of the other respondents when the announcement of the main order only was made. It must be impressed that the addendum order was already in existence since the 29 January 2024.

(ii) paragraph 22:

> On 12 February 2024 the applicant received clear information that in addition to the main order dated 29 January 2024, His Majesty… had issued an addendum order stipulating that the applicant be allowed to serve the reduced sentence of his imprisonment under the condition of 'home arrest' instead of confinement in Kajang Prison.

[150] In the second affidavit, the appellant states as follows:

(i) paragraph 4:

> On 7.03.2024, I read articles in newspapers that YB Dato' Sri Ismail Sabri Bin Yaakob raised a query in parliament with regards to my house arrest and whether it was a component of the pardon order of His Majesty ... dated 29 January 2024.

[151] Nowhere in both the supporting affidavit affirmed by the appellant refer to any source or basis for the information given that he had been given the addendum order. He merely states that he "received clear information" about the addendum order. As such, I agree with the learned judge's conclusion that his statements about the addendum order is purely hearsay and are therefore inadmissible.

[152] In support of his application, a supplementary affidavit was affirmed by Dato' Seri Dr Ahmad Zahid bin Hamidi ("Zahid Hamidi") on 9 April 2024. In his affidavit, Zahid Hamidi simply states that he was informed by Dato' Sri Utama Tengku Zafrul bin Tengku Abdul Aziz ("Tengku Zafrul") on 30 January 2024 about the addendum order and was shown a photo of it, which he (Tengku Zafrul) claimed came from His Majesty YDPA. The said addendum order was dated 29 January 2024, bore the royal seal and signature, and Zahid Hamidi unequivocally confirmed the same to be a genuine royal prerogative.

[153] I am of the considered opinion and I agree with the learned judge that Ahmad Zahid's affidavit clearly shows that he has no personal knowledge of the addendum order. His information came solely from Tengku Zafrul, who claimed to have seen and photographed the order shown to him by His Majesty YDPA. Zahid Hamidi only viewed the photograph on Tengku Zafrul's phone, and no copy of the photograph was produced, citing secrecy. I therefore agree with the learned judge's finding that Zahid Hamidi's statements are purely hearsay and therefore inadmissible.

[154] In another supporting affidavit affirmed by Dato' Sri Haji Wan Rosdy bin Wan Ismail ("Wan Rosdy") on 21 May 2024, the deponent states that he was informed by Tengku Zafrul that His Majesty YDPA XVI had reduced the prison sentence by 50% and set the fine at RM50 million. His Majesty YDPA XVI had also issued an addendum order allowing the appellant to serve the sentence under house arrest at home instead of in prison.

[155] I am of the considered opinion and I agree with the findings of the learned judge that Wan Rosdy's statements is purely hearsay and inadmissible. The affidavit affirmed by Wan Rosdy confirms that his knowledge of the addendum order is based entirely on information from Tengku Zafrul. Wan Rosdy has no personal knowledge of the order, apart from what was told and shown to him on Tengku Zafrul's mobile phone.

[156] The irony in this case that is worth pondering is why did the appellant objected to the affidavit filed by Tengku Zafrul. The importance of Tengku Zafrul's affidavit is that he was the sole source of information in both Zahid Hamidi and Wan Rosdy's affidavit on the existence of the addendum order. Without him, the applicant had no supporting evidence. Despite being the key source, Tengku Zafrul was not asked to file any affidavit on the appellant's behalf. Yet, when Tengku Zafrul tried to file an affidavit, there was strenuous objection to the same.

[157] In conclusion, none of the affidavits concerning the existence of the addendum order were made by deponents with direct knowledge. The evidence relied upon was purely hearsay. Accordingly, the requirement of O. 53 r. 3(2) ROC 2012 for a proper verifying affidavit was not satisfied.

Order Of Mandamus

[158] The remedy of *mandamus* is governed by s. 44 of the Specific Relief Act 1950 ("SRA") or para. 1 of the Schedule to the CJA. In this case, the application is brought under O. 53 ROC 2012 by way of judicial review. Therefore, the relief of *mandamus* must comply with s. 44 of the SRA, which is the applicable substantive law.

[159] Section 44 falls under Chapter VIII of Part 2 of the SRA and concerns the enforcement of public duties. Section 44(1) reads:

> ENFORCEMENT OF PUBLIC DUTIES
>
> 44. (1) A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:
>
> Provided that
>
> (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
>
> (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
>
> (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
>
> (d) the applicant has no other specific and adequate legal remedy; and
>
> (e) the remedy given by the order applied for will be complete.

[160] The principles for granting an order of *mandamus* have been set out by this court in *Peguam Negara Malaysia v. Dr Micheal Jeyakumar Devaraj* [2011] 9 CLJ 645 and *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia*

[2017] 10 CLJ 36. These cases confirm that all conditions for *mandamus* must be satisfied cumulatively, reaffirming the position stated by Sharma J in *Koon Hoi Chow v. Pretam Singh* [1972] CLJU 56; [1972] 1 LNS 56; [1972] 1 MLJ 180, that is to say:

(a) An order under s. 44 is in its nature an order of *mandamus*. It is a peremptory order of the Court commanding somebody to do that which it was his clear legal duty to do. The applicant seeking such an order must have a legal right to the performance of such duty by the person against whom the order is sought;

(b) The prerequisites essential to the issue of an order under s. 44 or of a *mandamus* are:

(i) whether the applicant in the High Court has a clear and specific legal right to the relief sought;

(ii) whether there is a duty imposed by law on the public officer(s);

(iii) whether such duty is of an imperative ministerial character involving no judgment or discretion on the part of the public officer(s); and

(iv) whether the applicant has any remedy, other than by way of *mandamus*, for the enforcement of the right which has been denied to him.

(c) These are the questions, but only some of the questions, which are necessary to be answered in every application for *mandamus*. The applicant must show not only that he has a legal right to have well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the public officer(s).

[161] On this issue, the learned judge made the following findings:

[51] In the instant case, there is no provision in any written law or the Federal Constitution that imposes a legal duty on the part of the Pardons Board to confirm the existence or produce any order wherein the power of pardon is exercised. It was agreed by all parties at the outset that there is no written law concerning the Pardons Board. *mandamus* can be granted only when a legal duty is imposed on an authority.

[52] In MP Jain '*Administrative Law of Malaysia and Singapore*' 3rd edn at pp. 652, 653 it is stated: The order of *mandamus* is a command issued by the High Court asking an authority to perform a public duty imposed upon it by law ... *mandamus* can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same, and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law. Thus, the criteria for the granting of *mandamus* in the instant case is not satisfied.

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> [53] As can be seen above and from the facts of the case, the applicant failed to show any failure on the part of the respondents, in particular, the Pardons Board, to perform any statutory duties compelled to them in law. For the foregoing reasons, I find that the applicant had failed to establish the necessary requirement under s. 44(1) of the SRA.

B

[162] I am of the considered opinion that the learned judge did not commit any error in the above findings. There is no provision in any written law or the Federal Constitution that imposes a legal duty on the Pardons Board to confirm or produce any order related to the exercise of the power of pardon. As there is no legal provision requiring the respondent(s) to carry out the

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duty in question, the appellant has no legal right to seek an order of *mandamus* regarding the addendum order. Therefore, the application is frivolous and vexatious and was correctly dismissed by the learned judge.

Conclusions

D

[163] For the above reasons, I am of the considered opinion that the learned judge did not commit any error in his decision is dismissing the leave application. The appeal is therefore dismissed with no order as to costs.

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